In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-909

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
PETITIONERS

v.

PATSY T. MINK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Relevant Docket Entries

No. 1614-71 in the United States District Court for the District of Columbia

Date	Proceedings
1971	
August 11	Complaint, appearance; Exhibits (2)
August 12	Complaint reflecting address of plts.; c/m 8-12-71. filed
August 20	Motion of Pltfs for preliminary injunction; and motion for summary judgment; statement; affidavit; exhibits # 3 & 4; P & A; in support of motions for summary judgment and preliminary injunction; c/m 8-20-71; M.C. filed
August 23	Motion of defts to dismiss or in the alternative for summary judgment; P & A's; statement; affidavit; exhibit A, b, c, d & e; c/m 8-23-71. filed
August 23	Opposition of defts. to plts' motion for preliminary injunction; c/m 8-23-71, Memo in support, Statement of facts. filed
August 23	Opposition of defts to plts' motion for summary judgment; c/m 8-23-71. filed
August 25	Supplemental memorandum of P & A's in support of pltf's motion for Preliminary Injunction, Summary Judgment and Emergency Consideration thereof, and in opposition to defts' Cross-motion to dismiss or for Summary Judgment; Exhibits # 5 & 6; affidavits (4); c/m 8-25-71. filed
August 27	Order granting motion of defts. to dismiss; granting motion of defts for summary judgment; denying motion of pltfs for summary

Date	Proceedings
	judgment; denying motion of pltfs. for preliminary injunction as moot; and dismissing cause. (N) Hart, J.
August 30	Notice of appeal by pltfs. from order of 8-27-71; copy mailed to Jeffrey Axelrod; $5.00 deposit by Clark. filed
August 31	Affidavit of pltf's in support of motion for summary judgment and/or preliminary injunction. Exhibit 3 filed

No. 71-1708 in United States Court of Appeals for the District of Columbia Circuit

1971	
September 3	4-Appellant's motion for summary reversal in camera examination, expedited consideration, and oral argument (p-2)
September 10	4-Appellee's objection to motion for summary reversal and for further relief (m-10)
October 15	Per Curiam order reversing judgment of the District Court and remanding case to the District Court for further consideration in accordance with opinion. SCJ Fahy, Leventhal and Wilkey, CJs. CJ Wilkey did not participate
October 15	Opinion and certified copy of order reversing and remanding issued to the District Court forthwith
November 2	Per Curiam order sua sponte, amending opinion filed October 15th. Fahy, Sr. CJ and Leventhal and Wilkey, CJ

No. 71-909 in the United States Supreme Court

1972	
January 13	Petition for a writ of certiorari filed
February 14	Brief for the respondents in opposition filed
March 6	Order granting petition for a writ of certiorari

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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C. A. No. 1614-71

AMENDED COMPLAINT FOR INJUNCTIVE RELIEF

[Filed August 12, 1971]

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DEPARTMENT OF STATE
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Washington, D. C. 20520

WILLIAM P. ROGERS
Secretary of State
Department of State
Washington, D. C. 20520

JOHN N. IRWIN, II
Undersecretary of State
Department of State
Washington, D. C. 20520,

DEFENDANTS.

1. This is an action under 5 U.S.C. § 552, the Freedom of Information Act, for an order requiring the production of certain records in the custody of the defendants and enjoining the defendants from continuing to withhold the said records as requested by plaintiffs.

2. The court has jurisdiction of the action under 5 U.S.C. § 552(a)(3).

3. The agency records sought to be produced are located within the District of Columbia at the offices of the defendants Environmental Protection Agency, Council on Environmental Quality, Office of Science and Technology, and Department of State.

4. Plaintiffs are duly elected and sworn members of the House of Representatives of the Ninety-Second Congress of the United States. Plaintiffs are persons within the meaning of 5 U.S.C. § 551.

5. The defendants Environmental Protection Agency, Council on Environmental Quality, Office of Science and Technology, and Department of State are agencies within the meaning of 5 U.S.C. § 551.

6. On information and belief, defendant Irwin, acting under the authority of defendant Rogers, served as chairman of and otherwise directed a certain inter-departmental committee that prepared a study, report, or other statement, concerning a proposed underground nuclear test at Amchitka Island known as "Cannikin."

7. On information and belief, the defendant Environmental Protection Agency (acting under the authority of its Administrator, defendant Ruckelshaus), defendant Council on Environmental Quality (acting under the authority of its Chairman, defendant Train) and defendant Office of Science and Technology (acting under the authority of its Director, defendant David) prepared critiques, recommendations, reports, or other submissions with respect to the study, report, or other statement prepared by the inter-departmental committee chaired by the said Irwin.

8. On July 28, 1971, plaintiff Mink, in her capacity as a member of the House of Representatives, sent a telegram to the President of the United States. The text of the telegram, a copy of which is annexed to this complaint as Exhibit 1, was as follows:

> "Urgently request that Administration honor its many promises and obey law by providing Congress with vitally needed information so it can properly legislate. Need immediate release of recommendations and report by inter-departmental committee urging cancella-

tion or postponement of underground nuclear test on Amchitka Island. Administration currently in violation of Freedom of Information Act by claiming material is classified as basis for refusal. Believe strongly that Congress entitled to know why the Environmental Protection Agency and Council of Environmental Quality opposed test. Continued secrecy on this aspect only helps to intensify public distrust of government."

9. On or about July 30, 1971, John W. Dean, III, counsel to the President, responded to plaintiff Mink's telegram by letter, a copy of which is annexed to this complaint as Exhibit 2. The text of Mr. Dean's letter was as follows:

"This is to thank you and reply to the request which you made on July 28 for the release of agency recommendations on the proposed underground nuclear test at Amchitka Island in Alaska.

"These recommendations were prepared for the advice of the President and involve highly sensitive matter that is vital to our national defense and foreign policy. Therefore, I regret to inform you that they are not available for release.

"We appreciate your interest in this matter."

10. Plaintiffs have exhausted their administrative remedies. Plaintiffs have complied with all applicable regulations.

11. The records requested by plaintiffs are subject to disclosure under the Freedom of Information Act and are not exempted from disclosure to plaintiffs under the Freedom of Information Act or any other applicable statute.

WHEREFORE, plaintiffs pray that this Court:

12. Issue an injunction against the defendants, their agents, servants, and employees, permanently enjoining them from further withholding the records requested;

13. Order the immediate production and inspection for copying by plaintiffs of the following records, relating to the proposed underground nuclear test at Amchitka Island known as "Cannikin";

(a) Any and all studies, reports, or other statements

by a certain inter-departmental committee, whether chaired or otherwise directed by defendant Irwin, otherwise under the authority of defendants Department of State and Rogers, or otherwise constituted or authorized;

(b) Any and all critiques, recommendations, reports or other submissions in connection with the records referred to in Paragraph 13(a) of the following defendants, and each of them:

(i) Environmental Protection Agency and/or Ruckelshaus;
(ii) Council on Environmental Quality and/or Train;
(iii) Office of Science and Technology and/or David.

/s/ Ramsey Clark
RAMSEY CLARK

A Member of the Firm of
Paul, Weiss, Rifkind, Wharton
& Garrison
1775 K Street, N.W.
Washington, D. C. 20006
(202) 293-6370

Dated: August 12, 1971
Washington, D. C.

Of Counsel:
Kenneth C. Bass, III
Leonard H. Becker

WESTERN UNION TELEGRAM

NO. WDS.—CL. OF SVC. PD. OR COLL. CASH NO.

Official

CHARGE TO THE ACCOUNT OF
REP. PATSY T. MINK

☐ OVER NIGHT TELEGRAM
UNLESS BOX ABOVE IS CHECKED THIS
MESSAGE WILL BE SENT AS A TELEGRAM

Send the following message, subject to the terms on back hereof, which are hereby agreed to July 28, 1971

TO ☐ The Honorable Richard M. Nixon

STREET & NO. President CARE OF
United States of America OR APT. NO.

CITY & STATE 1600 Pennsylvania Avenue, N.W. TELEPHONE
Washington, D.C. ZIP CODE 20500

Urgently request that Administration honor its many promises and obey law by providing Congress with vitally needed information so it can properly legislate. Need immediate release of recommendations and report by interdepartmental committee urging cancellation or postponement of underground nuclear test on Amchitka Island. Administration currently in violation of Freedom of Information Act by claiming material is classified as basis for refusal. Believe strongly that Congress entitled to know why the Environmental Protection Agency and Council of Environmental Quality opposed test. Continued secrecy on this aspect only helps to intensify public distrust of government.

PATSY T. MINK
Member of Congress

SENDER'S TEL. NO. 54906 NAME & ADDRESS Representative
Patsy T. Mink
301 Cannon
HOB

WU 1207 (R 5-69)

EXHIBIT 1

THE WHITE HOUSE

WASHINGTON

July 30, 1971

Aug. 2, 1971

Dear Mrs. Mink:

This is to thank you and reply to the request which you made on July 28 for the release of agency recommendations on the proposed underground nuclear test at Amchitka Island in Alaska.

These recommendations were prepared for the advice of the President and involve highly sensitive matter that is vital to our national defense and foreign policy. Therefore, I regret to inform you that they are not available for release.

We appreciate your interest in this matter.

Sincerely,

/s/ John W. Dean
JOHN W. DEAN, III
Counsel to the President

Honorable Patsy T. Mink
House of Representatives
Washington, D.C. 20515

EXHIBIT 2

[Certificate of Service Omitted in Printing]

[Title Omitted in Printing]

MOTION FOR PRELIMINARY INJUNCTION AND FOR EMERGENCY CONSIDERATION THEREOF

[Filed August 20, 1971]

Upon the Amended Complaint herein, the accompanying affidavit of Congresswoman Patsy T. Mink and supporting memorandum of points and authorities, and pursuant to Rule 65 of the Federal Rules of Civil Procedure, plaintiffs hereby move for an order preliminarily directing defendants to produce immediately for inspection and copying by plaintiffs the records described in Paragraph 13 of the Complaint and Amended Complaint, and for emergency consideration of the said motion.

The grounds for this motion, and for the application for emergency consideration, are:

1. Plaintiffs are Members of Congress who need the aforesaid information in order to perform the duties of their offices;

2. If the information is not made available to plaintiffs prior to the scheduled October detonation of a 5-megaton nuclear warhead at Amchitka Island, Alaska, plaintiffs' ability to exercise their constitutional duties will be irreparably injured;

3. Plaintiffs as Members of Congress are entitled as a matter of law to have access to these documents.

Respectfully submitted,

/s/ Ramsey Clark

RAMSEY CLARK
A Member of the Firm of
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1775 K Street, N. W.
Washington, D. C. 20006
(202) 293-6370

Dated:
August 20, 1971
Washington, D. C.

Of Counsel:
Kenneth C. Bass, III
Leonard H. Becker

[Title Omitted in Printing]

MOTION FOR SUMMARY JUDGMENT AND FOR EMERGENCY CONSIDERATION THEREOF

[Filed August 20, 1971]

Upon the Amended Complaint herein, the statement of material facts as to which there is no genuine issue, affidavit of Congresswoman Patsy T. Mink, and supporting memorandum of points and authorities, and pursuant to Rule 56 of the Federal Rules of Civil Procedure and Rule 9(h) of the Rules of the United States District Court for the District of Columbia, plaintiffs hereby move for summary judgment and for emergency consideration of the said motion.

The grounds for the motion, and for the application for emergency consideration, are set forth in the affidavit and memorandum referred to above.

Respectfully submitted,
/s/ Ramsey Clark
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(202) 293-6370

Dated:
August 20, 1971
Washington, D.C.

Of Counsel:
Kenneth C. Bass, III
Leonard H. Becker

[Title Omitted in Printing]

Statement of Material Facts as to Which There Is No Genuine Issue

[Filed August 20, 1971]

1. Each of the thirty-three plaintiffs in this action is a duly elected and confirmed member of Congress presently serving in the United States House of Representatives.

2. Defendant John N. Irwin, II, acting under the authority of defendant William P. Rogers, served as chairman of and otherwise directed a certain inter-departmental committee within the Executive branch of the United States Government that prepared a study, report or other statement concerning a proposed underground nuclear test at Amchitka Island known as "Cannikin."

3. Defendants Environmental Protection Agency (acting under the authority of its Administrator, defendant Ruckelshaus), Council on Environmental Quality (acting under the authority of its Chairman, defendant Train), and Office of Science and Technology (acting under the authority of its Director, defendant David) prepared critiques, recommendations, reports or other submissions with respect to said study, report or other statement prepared by the inter-departmental committee chaired by defendant Irwin.

4. Said study, reports, statements, critiques, recommendations and submissions are located within the District of Columbia at the offices of defendants Environmental Protection Agency, Council on Environmental Quality, Office of Science and Technology and Department of State.

5. On July 28, 1971, plaintiff Mink, in her capacity as a member of the House of Representatives, sent a telegram to the President of the United States. The text of the telegram, a copy of which is annexed to the complaint as Exhibit 1, was as follows:

"Urgently request that Administration honor its many

promises and obey law by providing Congress with vitally needed information so it can properly legislate. Need immediate release of recommendations and report by inter-departmental committee urging cancellation or postponement of underground nuclear test on Amchitka Island. Administration currently in violation of Freedom of Information Act by claiming material is classified as basis for refusal. Believe strongly that Congress entitled to know why the Environmental Protection Agency and Council on Environmental Quality opposed test. Continued secrecy on this aspect only helps to intensify public distrust of government."

6. On or about July 30, 1971, John W. Dean, III, Counsel to the President, responded to plaintiff Mink's telegram by letter, a copy of which is annexed to the complaint as Exhibit 2. The text of Mr. Dean's letter was as follows:

"This is to thank you and reply to the request which you made on July 28 for the release of agency recommendations on the proposed underground nuclear test at Amchitka Island in Alaska.

"These recommendations were prepared for the advice of the President and involve highly sensitive matter that is vital to our national defense and foreign policy. Therefore, I regret to inform you that they are not available for release.

"We appreciate your interest in this matter."

7. Plaintiffs have exhausted their administrative remedies. Plaintiffs have complied with all applicable regulations.

8. The plaintiffs in this action believe that they must have access to copies of the above mentioned study, critiques, recommendations, reports, and other submissions in order to perform their duties as members of the House of Representatives in accordance with the Constitution of the United States.

9. Plaintiffs are entitled to disclosure of the materials they seek under the Freedom of Information Act.

/s/ Ramsey Clark
RAMSEY CLARK
Attorney for Plaintiffs
A Member of the Firm of Paul, Weiss, Rifkind, Wharton & Garrison
1775 K Street, N. W.
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(202) 293-6370

Dated:
August 20, 1971
Washington, D. C.

Of Counsel:
Kenneth C. Bass, III
Leonard H. Becker

[Title Omitted in Printing]

AFFIDAVIT IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT AND/OR PRELIMINARY INJUNCTION

[Filed August 20, 1971; executed copy filed August 31, 1971]

} ss.:

PATSY T. MINK, being duly sworn, deposes and says:

1. I am the duly elected and qualified Member of Congress representing the second Congressional district of the State of Hawaii. I have served in the United States Congress continuously since January 3, 1965.

2. I make this affidavit in support of plaintiffs' motions for summary judgment and/or preliminary injunction in the above-captioned action.

3. The Atomic Energy Commission ("AEC") intends to detonate a 5-megaton nuclear warhead on Amchitka Island, Alaska, sometime during the first week in October 1971. The scheduled test detonation (code-named "Cannikin") is the latest in a series of underground nuclear explosions conducted by the AEC on Amchitka Island.

4. Amchitka Island is located in the Aleutian Island chain, an area of frequent and intense seismic activity that has been the site of several severe earthquakes. In 1946 an Aleutian earthquake triggered a tidal wave that rolled across the Pacific and killed 173 persons in Hawaii while destroying $25 million worth of property. Again in 1957 a similar earthquake caused $3 million worth of damage in Hawaii. And in 1964 another Alaska earthquake initiated a tidal wave that killed 12 persons in Crescent City, California.

5. Scientific evidence indicates that a large nuclear explosion on Amchitka Island could induce—either immediately or after a period of time—a severe earthquake that could cause damage well beyond the area of the test site.

6. The people of Hawaii are understandably concerned about the possible harmful effects of Cannikin. Many of

my constitutents [sic] have written to me to express their concern.

7. On July 15, 1971, the House of Representatives considered H. R. 9388, the Atomic Energy Commission authorization bill for fiscal 1972. At that time I introduced an amendment to the bill to eliminate funds authorized for Cannikin. During the course of the debate on that amendment, other members and I attempted to persuade our colleagues that the dangers involved clearly outweighed the benefits. My colleague, the Honorable Abner Mikva of Illinois, discussed possible adverse environmental effects that could result from the detonation. In reply, the Honorable John Anderson of Illinois stated that Mr. Mikva "has not presented us with a scintilla of evidence of how the adverse consequences of which he complains might occur. When the question involves the security of our Nation, then I think it is incumbent upon the gentleman to come forward with more than mere conjecture or hypothesis as to what might or could occur." (Congressional Record for July 15, 1971 at H 6787). The debates continued with those of us opposed to the test relying on what little information we had at hand. We were unable to persuade a majority of the House to agree with us, and the amendment was defeated. I believe a significant contributing factor to our inability to pass the amendment was the limited amount of scientific and other information we were able to present to the House in support of our arguments.

8. On July 20, 1971, the United States Senate considered H. R. 9388. During that consideration several Senators, including Senators Gravel and Stevens of Alaska, attempted to eliminate funds for the Amchitka test. Once again opponents of the test were hampered by limited information. The floor manager for the bill, Senator Pastore of Rhode Island, himself effectively conceded that neither he nor any other member of the Senate had sufficient factual information to question the conclusions and recommendations of the Executive Branch in this matter. (Congressional Record for July 20, 1971 at S 11510).

9. On July 26, 1971 an article was published in *The Evening Star* (a Washington, D. C., newspaper) indicating

that certain Federal agencies had recommended to The White House that Cannikin be cancelled. That article was the first indication I had that the Executive Branch possessed information not available to members of Congress. A copy of that article is attached hereto as Exhibit 3.

10. Since the House of Representatives was scheduled to consider the AEC appropriations bill, H. R. 10090, during the week of July 26, 1971, I tried to obtain the reports discussed in the *Star* article from The White House.

11. On July 28, 1971 I telegraphed the President of the United States, requesting the release of those recommendations since they apparently contained "vitally needed information" that the Congress had to have to properly carry out its constitutional function of making law. A copy of that telegram is attached as Exhibit 1 to the Complaint filed in this action.

12. On July 29, 1971 H.R. 10090 was considered on the floor of the House. At that time I offered an amendment prohibiting the use of any funds appropriated by that bill to finance Cannikin. I brought the *Star* article to the attention of the House and reported on my inability to obtain copies of the reports discussed in that article. In urging passage of the amendment, I told my colleagues:

> "The safety of the people of my State is involved. The safety and hazard to our environment are involved. The risks have been cited by some of our country's most eminent scientists. And now we are told these risks have been concurred in by our two Government agencies mandated by law to protect and safeguard our environment, and yet we are not able to even read these reports." (Congressional Record of July 29, 1971 at H 7409).

Again, those of us who opposed the test were unable to persuade a majority of our colleagues to join us, and the amendment was defeated by a vote of 275 to 108.

13. On July 31, 1971 the United States Senate considered H.R. 10090. Efforts were again made in that body to restrict the use of funds for Cannikin. Ultimately a compromise amendment was accepted by the Senate. The amend-

ment prohibits use of funds appropriated by the bill to finance the scheduled Amchitka test "unless the President gives his direct approval for such test." (Congressional Record of July 31, 1971 at S 2710). As passed by the Senate, H.R. 10090 contains that restriction.

14. H.R. 10090 as passed by the Senate contains amendments not present in the version passed by the House. The Senate has requested a conference with the House to resolve the differences between the two bills. (Congressional Record of July 31, 1971 at S 12738). Prior to the Congressional recess beginning August 6, 1971 the House of Representatives had not agreed to the conference requested by the Senate.

15. Some time after the Congress returns from its recess on September 8, 1971, the House of Representatives will consider the Senate's request for a conference. The House could decide to accept the Senate's version of H. R. 10090 and avoid the necessity of a conference. The House could also decide, however, to agree to the requested conference. At that time a motion to instruct the House conferees to accept the Amchitka test restriction could be offered. When and if the conference committee submits its report to the House, members may have another opportunity to vote on the Amchitka question. Thus the House of Representatives will have at least two additional occasions to exercise its constitutional prerogative on this issue.

16. The information contained in the recommendations to the President would be highly useful to individual members of Congress and the members of the conference committee in deciding whether to enact the Senate-passed restriction or some modification thereof.

17. The information contained in those recommendations would also be useful to members of Congress in considering the desirability of additional legislation or other Congressional action in this matter.

18. On August 2, 1971 I received a letter from John W. Dean, III, Counsel to the President, informing me that the reports described in the *Star* article were not available to members of Congress. A copy of that letter is attached as Exhibit 2 to the complaint filed herein.

19. I believe that the information contained in the recommendations to the President is essential to the proper conduct of my duties as the Representative of the people of the second Congressional district of Hawaii. I further believe that the satisfactory performance of my constitutional duties will be seriously impaired if I am unable to obtain those reports and recommendations.

20. The refusal of the Executive Branch to provide the information to a co-equal branch of the United States Government graphically illustrates the difficulties Congress faces in carrying out its legislative responsibilities. My colleagues who have joined in this action and I believe that proper conduct of the affairs of Government requires free and ready access by the Congress to any and all documents or information needed to enable us to act intelligently and to form our own independent judgments on questions of governmental policy. Our present and past inability to obtain information from the Executive Branch has been a major contributing factor in impairing the ability of the Congress to perform its duties. We who were in Congress when the Freedom of Information Act was passed believed that it would ameliorate the problems of access to official information. We bring this action to confirm and validate that belief.

/s/

PATSY T. MINK

Sworn to before me this —— day of August, 1971.

B-10 THE EVENING STAR
Washington, D. C., Monday, July 26, 1971

AGENCIES' VIEWS DIFFER ON AMCHITKA TEST BLAST

By James Welsh, *Star Staff Writer*

The White House has received conflicting recommendations from various government agencies on whether to go ahead this fall with an underground nuclear test on remote Amchitka Island.

According to informed sources, two federal agencies, the Department of Defense and the Atomic Energy Commission, favor a go-ahead for the five-megaton test blast.

For a variety of reasons, five other agencies—the State Department, the Office of Science and Technology, the United States Information Agency, the Environmental Protection Agency and the Council of Environmental Quality have recommended either cancelling the test or postponing it until after the SALT arms-limitations talks.

Amchitka is at the southwestern tip of the Aleutian Islands off Alaska, about 700 miles from the Soviet Union.

In October, 1969, the AEC set off a one-megaton hydrogen bomb 4,000 feet deep within the islands without causing any of the earthquakes, tidal waves or environmental damage feared by critics of the testing.

The megatonnage of this fall's planned test, which is code-named Cannikin, is five times as large. The nuclear device is scheduled to explode 6,000 feet underground. Cannikin is a test of a large Spartan warhead designated for use as a component of an ABM system protecting Minuteman missile sites.

The latest recommendations on the proposed test are a product of a departmental under-secretary committee named to investigate the controversy. The recommendations went directly to Henry Kissinger, Nixon's chief foreign policy adviser, and John Ehrlichman, chief domestic adviser.

The Defense Department and AEC, sources said yester-

day, continue to favor the testing as important to national security. They minimize the chances that the test will trigger earthquakes or cause other unwanted environmental side effects.

OST, which is the President's scientific advisory arm, reportedly opposes the experiment, not primarily for environmental reasons but because the warhead to be tested has been made obsolete by recent weapons development.

The State Department, sources said, took a middle ground. It did not recommend cancelling the test, but advised postponing it until the completion of the SALT talks. The Council of Environmental Quality took much the same position. The Environmental Protection Agency opposes the test, believing that even a slight possibility of earthquake is too much of a chance to take.

[Title Omitted in Printing]

MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

[Filed August 23, 1971]

Defendants, by their undersigned attorneys, pursuant to Rules 12(b)(1), (6) and 56 of the Federal Rules of Civil Procedure, hereby move to dismiss the action on the grounds that the Court lacks jurisdiction over the subject matter of the action and the complaint fails to state a claim upon which relief can be granted or, in the alternative, for summary judgment on the ground that there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law.

In support of this motion, the Court is respectfully referred to the affidavit of John N. Irwin II, attached hereto, and to Defendants' Statement of Material Facts as to Which There is No Genuine Issue and Memorandum of Points and Authorities in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, filed herewith.

Respectfully submitted,

/s/ L. Patrick Gray, III
L. PATRICK GRAY, III
Assistant Attorney General

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
United States Attorney

/s/ Harland F. Leathers
HARLAND F. LEATHERS
/s/ Jeffrey Axelrad
JEFFREY AXELRAD
Attorneys, Department of Justice
Attorneys for Defendants

[Title Omitted in Printing]

AFFIDAVIT OF JOHN N. IRWIN II

[Filed August 23, 1971]

CITY OF WASHINGTON
DISTRICT OF COLUMBIA

I, John N. Irwin II, being duly sworn, do depose and state as follows:

1. I am the Under Secretary of State of the Department of State. The facts stated in this affidavit have come to my knowledge in my official capacity.

2. President Richard M. Nixon established on January 20, 1969, a Committee of which the Under Secretary of the Department of State was appointed Chairman by virtue of his position. This Committee is known as the Under Secretaries Committee and is a constituent part of the National Security Council system. This system was shaped in its present form by the President so that he could use it as an instrument for obtaining advice on important questions relating to our national security. Excerpts from a report to the Congress by the President, dated February 18, 1970, describing the National Security Council system are attached hereto as Exhibit A. By a further report to the Congress dated February 25, 1971, excerpts of which are attached as Exhibit B, the President informed Congress that the Under Secretaries Committee, of which I am currently Chairman, "links the process of policy formulation to the operations of the Government."

3. On June 27, 1969, the President directed the Under Secretaries Committee to review the annual underground nuclear test program and to encompass within this review requests for authorization of specific scheduled tests. He directed that the Committee consider the policy and technical justification for the proposed tests to determine whether they are consistent with the requirements of national security and foreign policy. He requested that the

results of the Committee's review of the underground nuclear tests programs and its recommendations be transmitted to him in time to allow him to give them full consideration before the scheduled events.

4. On August 12, 1970, the Under Secretaries Committee sent its review of the fiscal year 1971 underground test program to the President and pointed out that it would begin early consideration of the proposed Cannikin underground test proposed for the 1972 fiscal year.

5. In accordance with the foregoing directions from the President, the Under Secretaries Committee has prepared a report upon the proposed underground nuclear test known as Cannikin consisting of the following:

A. A memorandum prepared by me to the President dated July 17, 1971. This memorandum is classified as Top Secret and as Restricted Data.

B. Attached to that memorandum to the President was a report of the Under Secretaries Committee on the proposed Cannikin test. This report is classified Top Secret and as Restricted Data. The following documents were attached to this report:

1. A letter from the Chairman of the Atomic Energy Commission to the Chairman of the Under Secretaries Committee, myself. This letter is separately classified Secret and separately as Restricted Data.

2. A report of the Defense Program Review Committee, the Chairman of which is Dr. Henry Kissinger. This report is separately classified as Top Secret and separately as Restricted Data.

3. The Environmental Statement Cannikin, dated June 1971, by the United States Atomic Energy Commission. This document is publicly available and a copy is attached as Exhibit C.

4. A transcript of a briefing by the Atomic Energy Commission on Cannikin given orally to the Under Secretaries Committee. This document is separately classified as Secret and separately as Restricted Data; and

5. A memorandum to me from the Council on En-

vironmental Quality. This memorandum is an attachment to the classified report and is separately unclassified.

C. In addition, letters containing recommendations were transmitted to me regarding the proposed test known as Cannikin by Mr. William D. Ruckelshaus for the Environmental Protection Agency, by Mr. Russell Train, for the Council on Environmental Quality and by Dr. Edward E. David, Jr., for the Office of Science and Technology. Each of these three letters is classified Top Secret and as Restricted Data.

The documents described in this paragraph, except for item B3 above, were prepared solely for the purpose of giving advice to the President and involve, except for item B5 above, highly sensitive matter that is vital to our national defense and foreign policy. They were prepared and used solely for transmittal to the President as advice and recommendations and set forth the views and opinions of the individuals and agencies preparing the documents so that the President might be fully apprised of varying viewpoints and have been used for no other purpose.

6. The documents described in the preceding paragraph as Top Secret and Secret are and have been classified pursuant to Executive Order No. 10501, and the documents described as Restricted Data are and have been classified pursuant to the Atomic Energy Act of 1954, as amended. (42 USC 2014(Y), 2161 and 2162). The classified documents so described make use of data which have been identified by the Atomic Energy Commission as Restricted Data and of data classified by other agencies as Top Secret and Secret. Only persons with a "Q" clearance, or a comparable Department of Defense clearance, may have access to information which is Restricted Data. Attached as Exhibit D is an Atomic Energy Commission pamphlet which applies to State Department employees and others and details the handling of Restricted Data. I am advised that the Atomic Energy Commission is reviewing the relevant documents to determine whether or not the Restricted Data classification can now be removed.

7. As Chairman of the Under Secretaries Committee, I sought to make publicly available as much information as possible consistent with the needs of national defense and foreign policy. For instance, by letter dated January 8, 1971, attached as Exhibit E, I sought to have certain information declassified. The Defense Department subsequently agreed and the information referred to in my January 8, 1970 letter has been made public. The information in the documents described in this affadivit which is not public necessarily is held in strict confidence by the Government in order to prevent grave damage to our national defense and foreign policy interests.

/s/ John N. Irwin II
JOHN N. IRWIN II

Subscribed and sworn to before me this 19th day of August, 1971, in the City of Washington, District of Columbia.

/s/ Marcelle A. Ward
My Commission Expires Oct. 31, 1971

U.S. FOREIGN POLICY

FOR THE 1970's

A NEW STRATEGY FOR PEACE

[Seal]

A Report To The Congress

By

RICHARD NIXON

President of the United States

February 18, 1970

EXHIBIT A

[Table of Contents Omitted in Printing]

[pages 17-23]

The National Security Council System

If we were to establish a new foreign policy for the era to come, we had to begin with a basic restructuring of the process by which policy is made.

Our fresh purposes demanded new methods of planning and a more rigorous and systematic process of policymaking. We required a system which would summon and gather the best ideas, the best analyses and the best information available to the government and the nation.

Efficient procedure does not insure wisdom in the substance of policy. But given the complexity of contemporary choices, adequate procedures are an indispensable component of the act of judgment. I have long believed that the most pressing issues are not necessarily the most fundamental ones; we know that an effective American policy requires clarity of purpose for the future as well as a procedure for dealing with the present. We do not want to exhaust ourselves managing crises; our basic goal is to shape the future.

At the outset, therefore, I directed that the National Security Council be reestablished as the principal forum for Presidential consideration of foreign policy issues. The revitalized Council—composed by statute of the President, the Vice President, the Secretaries of State and Defense, and the Director of the Office of Emergency Preparedness—and its new system of supporting groups are designed to respond to the requirements of leadership in the 1970's:

—Our policy must be creative: foreign policy must mean more than reacting to emergencies; we must fashion a new and positive vision of a peaceful world, and design new policies to achieve it.

—Our policymaking must be systematic: our actions must be the products of thorough analysis, forward planning, and deliberate decision. We must master problems before they master us.

—We must know the facts: intelligent discussions in

the National Security Council and wise decisions require the most reliable information available. Disputes in the government have been caused too often by an incomplete awareness or understanding of the facts.

—We must know the alternatives: we must know what our real options are and not simply what compromise has found bureaucratic acceptance. Every view and every alternative must have a fair hearing. Presidential leadership is not the same as ratifying bureaucratic consensus.

—We must be prepared if crises occur: we must anticipate crises where possible. If they cannot be prevented, we must plan for dealing with them. All the elements of emergency action, political as well as military, must be related to each other.

—Finally, we must have effective implementation: it does little good to plan intelligently and imaginatively if our decisions are not well carried out.

Creativity: Above all, a foreign policy for the 1970's demands imaginative thought. In a world of onrushing change, we can no longer rest content with familiar ideas or assume that the future will be a projection of the present. If we are to meet both the peril and the opportunity of change, we require a clear and positive vision of the world we seek—and of America's contribution to bringing it about.

As modern bureaucracy has grown, the understanding of change and the formulation of new purposes have become more difficult. Like men, governments find old ways hard to change and new paths difficult to discover.

The mandate I have given to the National Security Council system, and the overriding objective of every policy review undertaken, is to clarify our view of where we want to be in the next three to five years. Only then can we ask, and answer, the question of how to proceed.

In central areas of policy, we have arranged our procedure of policymaking so as to address the broader questions of long-term objectives first; we define our purposes, and

then address the specific operational issues. In this manner, for example, the NSC first addressed the basic questions of the rationale and doctrine of our strategic posture, and then considered—in the light of new criteria of strategic sufficiency—our specific weapons programs and our specific policy for the negotiations on strategic arms limitation. We determined that our relationship with Japan for the 1970's and beyond had to be founded on our mutual and increasingly collaborative concern for peace and security in the Far East; we then addressed the issue of Okinawa's status in the light of this fundamental objective.

Systematic Planning: American foreign policy must not be merely the result of a series of piecemeal tactical decisions forced by the pressures of events. If our policy is to embody a coherent vision of the world and a rational conception of America's interests, our specific actions must be the products of rational and deliberate choice. We need a system which forces consideration of problems before they become emergencies, which enables us to make our basic determinations of purpose before being pressed by events, and to mesh policies.

The National Security Council itself met 37 times in 1969, and considered over a score of different major problems of national security. Each Council meeting was the culmination of an interagency process of systematic and comprehensive review.

This is how the process works: I assign an issue to an Interdepartmental Group—chaired by an Assistant Secretary of State—for intensive study, asking it to formulate the policy choices and to analyze the pros and cons of the different courses of action. This group's report is examined by an interagency Review Group of senior officials—chaired by the Assistant to the President for National Security Affairs—to insure that the issues, options, and views are presented fully and fairly. The paper is then presented to me and the full National Security Council.

Some topics requiring specialized knowledge are handled through different channels before reaching the National Security Council. But the purpose is the same—systematic

review and analysis, bringing together all the agencies concerned.

—The major issues of defense policy are treated in systematic and integrated fashion by the NSC Defense Program Review Committee. This group reviews at the Under Secretary level the major defense policy and program issues which have strategic, political, diplomatic, and economic implications in relation to overall national priorities.

—Through other NSC interagency groups, the United States Government has undertaken its first substantial effort to review all its resource programs within certain countries on a systematic and integrated basis, instead of haphazardly and piecemeal.

Determination of the Facts: Intelligent discussions and decisions at the highest level demand the fullest possible information. Too often in the past, the process of policy-making has been impaired or distorted by incomplete information and by disputes in the government which resulted from the lack of a common appreciation of the facts. It is an essential function of the NSC system, therefore, to bring together all the agencies of the government concerned with foreign affairs to elicit, assess, and present to me and the Council all the pertinent knowledge available.

Normally, NSC Interdepartmental Groups are assigned this task. But other interagency groups perform this function for certain special topics. For example:

—The Verification Panel was formed to gather the essential facts relating to a number of important issues of strategic arms limitation, such as Soviet strategic capabilities, and our potential means of verifying compliance with various possible agreements. This Panel was designed not to induce agreement on policy views, but to establish as firmly as possible the data on which to base policy discussions. It helped to resolve many major policy differences which might otherwise have been intractable. As the section on Arms Control in this report

explains in detail, the Panel played a central part in making our preparation for the Strategic Arms Limitation Talks with the Soviet Union the most thorough in which the U.S. Government has ever engaged.

—The Vietnam Special Studies Group (VSSG) gathers and presents to the highest levels of the United States Government the fullest and most up-to-date information on trends and conditions in the countryside in Vietnam. This group is of key assistance in our major and sustained effort to understand the factors which will determine the course of Vietnamization.

Full Range of Options: I do not believe that Presidential leadership consists merely in ratifying a consensus reached among departments and agencies. The President bears the Constitutional responsibility of making the judgments and decisions that form our policy.

The new NSC system is designed to make certain that clear policy choices reach the top, so that the various positions can be fully debated in the meeting of the Council. Differences of view are identified and defended, rather than muted or buried. I refuse to be confronted with a bureaucratic consensus that leaves me no options but acceptance or rejection, and that gives me no way of knowing what alternatives exist.

The NSC system also insures that all agencies and departments receive a fair hearing before I make my decisions. All Departments concerned with a problem participate on the groups that draft and review the policy papers. They know that their positions and arguments will reach the Council without dilution, along with the other alternatives. Council meetings are not rubber-stamp sessions. And as my decisions are reached they are circulated in writing, so that all departments concerned are fully informed of our policy, and so that implementation can be monitored.

Crisis Planning: Some events in the world over which we have little control may produce crises that we cannot prevent, even though our systematized study forewarns us

of their possibility. But we can be the masters of events when crises occur, to the extent that we are able to prepare ourselves in advance.

For this purpose, we created within the NSC system a special senior panel known as the Washington Special Actions Group (WSAG). This group drafts contingency plans for possible crises, integrating the political and military requirements of crisis action. The action responsibilities of the departments of the Government are planned in detail, and specific responsibilities assigned in an agreed time sequence in advance. While no one can anticipate exactly the timing and course of a possible crisis, the WSAG's planning helps insure that we have asked the right questions in advance, and thought through the implications of various responses.

Policy Implementation: The variety and complexity of foreign policy issues in today's world places an enormous premium on the effective implementation of policy. Just as our policies are shaped and our programs formed through a constant process of interagency discussion and debate within the NSC framework, so the implementation of our major policies needs review and coordination on a continuing basis. This is done by an interdepartmental committee at the Under Secretary level chaired by the Under Secretary of State.

Conclusions

There is no textbook prescription for organizing the machinery of policymaking, and no procedural formula for making wise decisions. The policies of this Administration will be judged on their results, not on how methodically they were made.

The NSC system is meant to help us address the fundamental issues, clarify our basic purposes, examine all alternatives, and plan intelligent actions. It is meant to promote the thoroughness and deliberation which are essential for an effective American foreign policy. It gives us the means to bring to bear the best foresight and insight of which the nation is capable.

U.S. FOREIGN POLICY

FOR THE 1970's

Building For Peace

[Seal]

A Report To The Congress

By

Richard Nixon

President of the United States

February 25, 1971

Exhibit B

[Table of Contents Omitted in Printing]

[pages 226-229]

"The NSC system is meant to help us address the fundamental issues, clarify our basic purposes, examine all alternatives, and plan intelligent actions. It is meant to promote the thoroughness and deliberation which are essential for an effective American foreign policy."

U.S. Foreign Policy For The 1970's
A Report to the Congress
February 18, 1970

Upon my inauguration, I reestablished the National Security Council as the principal forum for consideration of foreign policy issues and created a system of supporting committees to serve it. Chaired by the President and comprising the Vice President, the Secretaries of State and Defense, the Director of the Office of Emergency Preparedness, and others at my invitation, the Council provides a focus at the highest level of our government for full and frank discussions of national security issues. Of course, I also consult the Secretaries of State and Defense and other senior advisors individually to obtain their views on national security issues.

Too often in the past our foreign policy machinery was the captive of events. Day-to-day tactical considerations occupied our time and determined our actions. Policy emerged from a narrow rather than conceptual perspective. The National Security Council system helps us concentrate on purposes and develop policy in the context of our long-range goals.

The Process

Creativity, systematic planning, and thorough analysis are given special emphasis. It is every concerned agency's obligation to contribute information and analysis and to present and argue its position. Only in this way can I be certain that the full range of views and reasonable options has been explored.

The system helps us to bring together all the knowledge available and to bring to bear the best analytical thought of which we are capable:

—Analysis and decision must rest on the broadest possible factual base. There must be a common appreciation of the facts and of their relevance.

—Coherent policy needs a conceptual framework. Where do we want to go in the long run? What are our purposes? Our analysis must bring out all reasonable interpretations of the facts, and treat the facts in the framework of longer-range trends and our objectives.

—I have made sure that my choice is not limited to ratifying or rejecting bureaucratic compromises which submerge differences to accommodate varying interests within the government. I insist that the facts, issues, and conceptual framework for decision be presented together with alternative courses of action, their pros and cons, and costs and consequences.

The Structure

The NSC system is designed to marshal all the resources and expertise of the departments and agencies of the government. The National Security Council is the apex of the system. It is here that the final refinement of studies conducted at lower levels provides a common framework for thorough deliberation. The Council's discussions assist me by illuminating the issues and focusing the range of realistic choice before I make my decision.

The supporting interagency groups of the system do the preparatory work before consideration of major issues by the Council:

—The Interdepartmental Groups, each chaired by an Assistant Secretary of State, are the system's basic sub-groups for policy analysis. They are organized on a geographic or functional basis, and include membership from all appropriate agencies. They do the

basic studies and develop the range of choices. In some instances ad hoc groups, each chaired by a representative of the appropriate agency at the Assistant Secretary level, are established to deal with specific policy issues.

—The Vietnam Special Studies Working Group is a specialized group for assembling and analyzing factual data on the Vietnam countryside, the economic situation, and other factors affecting Vietnamization. It has investigated specific topics which bear on our negotiating efforts, such as the security implications of alternative ceasefire proposals.

—The Verification Panel, a senior group at the Under Secretary level, performs the basic technical analysis to help develop choices and proposals for strategic arms limitation, approaches to mutual and balanced force reductions in Europe, and other major arms control subjects.

—The Defense Program Review Committee, also at the Under Secretary level, deals with the major issues of defense policy, posture, and budgetary support. It integrates our consideration of the strategic, international political, and economic implications of defense programs. And it relates our defense programs and resource requirements to overall national priorities and the federal budget.

We made changes in the NSC system this past year in the light of experience, primarily to provide a higher-level focus and integration below the National Security Council itself. Two principal groups were raised from the Assistant Secretary to the Under Secretary level. Because the responsibilities of officials at the Under Secretary level transcend specific geographic or functional areas, they are able to view issues in broad perspective; they can draw more fully upon the complete resources of their respective agencies to assure that the entire spectrum of arguments and alternatives is exposed.

—The Senior Review Group directs and reviews the

policy studies prepared by the Interdepartmental Groups and Working Groups. It sees to it that these studies present the facts, the issues, the arguments, and the range of choice, before the studies are considered by the President and the National Security Council.

—The Washington Special Actions Group develops options for implementation of decisions during crises. In 1970, the WSAG had to deal with such situations as Cambodia, the Middle East, and Jordan. In each case, it laid the groundwork for reasoned decisions to prevent crises from expanding and threatening our interests and the peace.

The success of any policy depends largely on effective implementation by the responsible departments and agencies. The Under Secretaries Committeee, chaired by the Under Secretary of State, links the process of policy formulation to the operations of the government. Through interagency review and coordination, it helps to insure that decisions are carried out consistently with policy and uniformly throughout the foreign affairs community. It also recommends to me alternative operational steps to implement broad policy decisions; it develops the details, for example, of our positions in certain important negotiations within the guidelines laid down by the National Security Council.

[Title Omitted in Printing]

OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUCTION

[Filed August 23, 1971]

Defendants, by their undersigned attorneys, hereby oppose plaintiffs' Motion for Preliminary Injunction and respectfully request that it be denied.

In support of this Opposition, the Court is respectfully referred to the Affidavit of John N. Irwin II and Memorandum in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, filed herewith.

Respectfully submitted,

/s/ L. Patrick Gray, III
L. PATRICK GRAY, III
Assistant Attorney General

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
United States Attorney

/s/ Harland F. Leathers
HARLAND F. LEATHERS

/s/ Jeffrey Axelrad
JEFFREY AXELRAD
Attorneys, Department of Justice
Attorneys for Defendants

[Title Omitted in Printing]

OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

[Filed August 23, 1971]

Defendants, by their undersigned attorneys, hereby oppose plaintiffs' Motion for Summary Judgment and respectfully request that it be denied.

Defendants aver that the sole material facts are those set forth in Defendants' Statement of Material Facts as to Which There is No Genuine Issue, filed herewith.

In support of this Opposition, the Court is respectfully referred to the Affidavit of John N. Irwin II and Memorandum in Support of Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, filed herewith.

Respectfully submitted,

/s/ L. Patrick Gray, III
L. PATRICK GRAY, III
Assistant Attorney General

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
United States Attorney

/s/ Harland F. Leathers
HARLAND F. LEATHERS

/s/ Jeffrey Axelrad
JEFFREY AXELRAD
Attorneys, Department of Justice
Attorneys for Defendants

[Title Omitted in Printing]

Defendants' Statement of Material Facts As To Which There Is No Genuine Issue

[Filed August 23, 1971]

1. Each of the plaintiffs seeks to maintain this action solely in his capacity as a member of Congress.

2. President Richard M. Nixon established on January 20, 1969, a Committee of which the Under Secretary of the Department of State was appointed Chairman by virtue of his position. This Committee is known as the Under Secretaries Committee and is a constituent part of the National Security Council system. This system was shaped in its present form by the President so that he could use it as an instrument for obtaining advice on important questions relating to our national security. By a report to the Congress dated February 25, 1971, the President informed Congress that the Under Secretaries Committee, of which Mr. John N. Irwin II is currently Chairman "links the process of policy formulation to the operations of the Government."

3. On June 27, 1969, the President directed the Under Secretaries Committee to review the annual underground nuclear test program and to encompass within this review requests for authorization of specific scheduled tests. He directed that the Committee consider the policy and technical justification for the proposed tests to determine whether they are consistent with the requirements of national security and foreign policy. He requested that the results of the Committee's review of the underground nuclear tests programs and its recommendations be transmitted to him in time to allow him to give them full consideration before the scheduled events.

4. On August 12, 1970, the Under Secretaries Committee sent its review of the fiscal year 1971 underground test program to the President and pointed out that it would

begin early consideration of the proposed Cannikin underground test proposed for the 1972 fiscal year.

5. In accordance with the foregoing directions from the President, the Under Secretaries Committee has prepared a report upon the proposed underground nuclear test known as Cannikin consisting of the following:

A. A memorandum prepared by Mr. John N. Irwin II to the President dated July 17, 1971. This memorandum is classified as Top Secret.

B. Attached to that memorandum to the President was a report of the Under Secretaries Committee on the proposed Cannikin test. This report is classified Top-Secret. The following documents were attached to this report:

1. A letter from the Chairman of the Atomic Energy Commission to the Chairman of the Under Secretaries Committee, Mr. John N. Irwin II. This letter is separately classified Secret;

2. A report of the Defense Program Review Committee, the Chairman of which is Dr. Henry Kissinger. This report is separately classified as Top Secret;

3. The Environmental Statement Cannikin, dated June 1971, by the United States Atomic Energy Commission. This document is publicly available;

4. A transcript of a briefing by the Atomic Energy Commission on Cannikin given orally to the Under Secretaries Committee. This document is separately classified as Secret; and

5. A memorandum to the Under Secretary of State from the Council on Environmental Quality. This memorandum is an attachment to the classified report.

C. In addition, letters containing recommendations were transmitted to the Under Secretary of State regarding the proposed test known as Cannikin by Mr. William D. Ruckelshaus, for the Environmental Protection Agency, by Mr. Russell Train, for the Council on Environmental Quality and by Dr. Edward E. David, Jr., for the Office of Science and Technology. Each of these three letters is classified Top Secret.

The documents described in this paragraph, except for

item B3 above, were prepared solely for the purpose of giving advice to the President and involve, except for item B5 above, highly sensitive matter that is vital to our national defense and foreign policy. They were prepared and used solely for transmittal to the President as advice and recommendations and set forth the views and opinions of the individuals and agencies preparing the documents so that the President might be fully apprised of varying viewpoints and have been used for no other purpose.

6. The documents described in the preceding paragraph as Top Secret and Secret are and have been classified pursuant to Executive Order No. 10501.

7. The information plaintiffs seek which is not public necessarily is held in strict confidence by the Government in order to prevent grave damage to our national defense and foreign policy interests.

Respectfully submitted,

/s/ L. Patrick Gray, III
L. Patrick Gray, III
Assistant Attorney General

/s/ Thomas A. Flannery
Thomas A. Flannery
United States Attorney

/s/ Harland F. Leathers
Harland F. Leathers

/s/ Jeffrey Axelrad
Jeffrey Axelrad
Attorneys, Department of Justice
Attorneys for Defendants

[Certificate of Service Omitted in Printing]

[Title Omitted in Printing]

AFFIDAVIT IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT AND PRELIMINARY INJUNCTION

[Filed August 25, 1971]

STATE OF ALASKA
THIRD JUDICIAL DISTRICT } ss.

NICK BEGICH, being first duly sworn, deposes and says:

1. I am the duly elected and qualified Member of Congress representing the State of Alaska.

2. I make this Affidavit in support of plaintiffs' Motions for Summary Judgment and Preliminary Injunction in the above-captioned action.

3. In my capacity as a Member of Congress, I am concerned with the possible detrimental effects of the proposed underground detonation of a nuclear warhead at Amchitka Island, Alaska, by the Atomic Energy Commission.

4. Many of my constituents have expressed to me their own concern over the possible effects of the detonation on the people and the State of Alaska. I have attempted, as a Member of Congress, to stop the detonation by amendments to the AEC appropriations and authorization bills for fiscal 1972.

5. I understand that certain reports and recommendations concerning the detonation were prepared by a Committee within the Executive Branch chaired by John N. Irwin, II, Undersecretary of State.

6. I believe that the information contained in those reports and recommendations is essential to the proper conduct of my duties as the Representative of the people of the State of Alaska. I further believe that the satisfactory performance of my constitutional duties will be seriously impaired if I am unable to obtain those reports and recommendations.

/s/ Nick Begich
NICK BEGICH

SUBSCRIBED AND SWORN TO before me this 20 day of August, 1971, at Anchorage, Alaska.

/s/ June F. Selanoff
Notary Public in and for Alaska
My commission expires: 12-6-72

[Title Omitted in Printing]

AFFIDAVIT

IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT AND/OR PRELIMINARY INJUNCTION

[Filed August 25, 1971]

COUNTY OF ORANGE }
STATE OF NEW YORK } ss.:

JOHN G. DOW, being duly sworn, deposes and says:

1. I am the duly elected and qualified Member of Congress representing the twenty-seventh Congressional district of the State of New York.

2. In my capacity as a Member of Congress I am concerned about the possible detrimental effects of the proposed underground detonation of a nuclear warhead at Amchitka Island, Alaska.

3. I understand that certain reports and recommendations concerning the detonation were prepared by a committee within the Executive Branch chaired by John N. Irwin, II, Undersecretary of State.

4. I believe that the information contained in those reports and recommendations is essential to the proper conduct of my duties as the Representative of the people of the twenty-seventh Congressional district of the State of New York. I further believe that the satisfactory performance of my constitutional duties will be seriously impaired if I am unable to obtain those reports and recommendations.

/s/ John G. Dow
JOHN G. DOW

Sworn to before me this
23rd day of August, 1971.

/s/ Gerald T. Donald
GERALD T. DONALD
Notary Public, State of New York
Residing in Orange County
Commission Expires March 30, 1972

[Title Omitted in Printing]

AFFIDAVIT

IN SUPPORT OF MOTIONS FOR SUMMARY JUDGMENT AND/OR PRELIMINARY INJUNCTION

[Filed August 25, 1971]

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss.:

BENJAMIN S. ROSENTHAL, being duly sworn, deposes and says:

1. I am the duly elected and qualified Member of Congress representing the eighth Congressional district of the State of New York. I have served in the United States Congress continuously since February 20, 1962.

2. In my capacity as a Member of Congress I am concerned about the possible detrimental effects of the proposed underground detonation of a nuclear warhead at Amchitka Island, Alaska.

3. I understand that certain reports and recommendations concerning the detonation were prepared by a committee within the Executive Branch chaired by John N. Irwin, II, Undersecretary of State.

4. I believe that the information contained in those reports and recommendations is essential to the proper conduct of my duties as the Representative of the people of the eighth Congressional district of the State of New York. I further believe that the satisfactory performance of my constitutional duties will be seriously impaired if I am unable to obtain those reports and recommendations.

/s/ Benjamin S. Rosenthal
BENJAMIN S. ROSENTHAL

Sworn to before me this
23rd day of August, 1971.

/s/ Marvin R. Evans
MARVIN R. EVANS
Notary Public, District of Columbia
Commission Expires April 30, 1972

The district court's order of August 27, 1971, dismissing plaintiffs' action is printed at Pet. App. C.

[Title Omitted in Printing]

JOINT NOTICE OF APPEAL

[Filed August 30, 1971]

Please take notice that each of the 33 named plaintiffs in the above-captioned action hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the final order of this Court entered August 27, 1971 dismissing plaintiffs' complaint insofar as plaintiffs sued as Members of Congress, granting defendants' motion for summary judgment, denying plaintiff's motions for summary judgment and preliminary injunction, and dismissing the action in its entirety.

/s/ Ramsey Clark
RAMSEY CLARK
Attorney for Plaintiffs
Paul, Weiss, Rifkind,
Wharton & Garrison
1775 K Street, N.W.
Washington, D. C. 20006
(202) 293-6370

Dated: August 30, 1971
Washington, D. C.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PATSY T. MINK, ET AL.,
APPELLANTS,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
APPELLEES.

No. 71-1708

MOTION FOR SUMMARY REVERSAL, IN CAMERA EXAMINATION, EXPEDITED CONSIDERATION, AND ORAL ARGUMENT

[Filed September 3, 1971]

Appellants Patsy T. Mink, et al., hereby move this Court as follows:

(1) For an order summarily reversing the August 27, 1971 order of the District Court granting appellees' motion for summary judgment, denying appellants' motion for summary judgment and preliminary injunction, and dismissing appellants' suit insofar as they sought relief as Members of Congress;

(2) For an *in camera* examination by this Court of the documents sought by appellants;

(3) For an order requiring a response by appellees to this motion by September 8, 1971;

(4) For an expedited consideration of the above motions; and

(5) For an oral argument, if this Court does not consider summary reversal appropriate.

As grounds for the motions, appellants respectfully refer

the court to the memorandum of points and authorities submitted in support of the within-motions.

Respectfully submitted,
RAMSEY CLARK
Attorney for Appellants
A Member of the Firm of
Paul, Weiss, Rifkind, Wharton
& Garrison
1775 K Street, N. W.
Washington, D. C. 20006
(202) 293-6370

Dated: September 3, 1971
Washington, D. C.

Of Counsel:
Kenneth C. Bass III
Peter Westen

[Title Omitted in Printing]

AFFIDAVIT

[Filed September 3, 1971]

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss.:

E. W. KENWORTHY, being duly sworn, deposes and says:

1. I am a newspaper reporter for *The New York Times.*

2. On September 2, 1971, I published an article in *The New York Times* concerning a breakfast meeting between William D. Ruckelshaus, Administrator of the Environmental Protection Agency, and a number of reporters.

3. A true copy of that article is attached hereto and marked as "Exhibit I." The article states:

> In a breakfast meeting with reporters yesterday, Mr. Ruckelshaus was asked whether he thought that his letter needed to be classified. He replied:
>
> "The document I received [from Mr. Irwin for comment] was marked 'top secret.' I was informed my comment should be 'top secret.' There was nothing in my comment that needs to be stamped 'top secret.' "

4. I am one of the reporters who attended that breakfast meeting. I am the reporter who asked Mr. Ruckelshaus whether he thought that his letter needed to be classified. I hereby verify and confirm that the above quoted statement by Mr. Ruckelshaus was made by him in my presence and is accurately quoted in this affidavit and in the newspaper article itself.

/s/ E. W. Kenworthy
E. W. KENWORTHY

Subscribed and sworn to before me
this 2nd day of September, 1971.

Betty Mae Smith
Notary Public
My Commission Expires: Sept. 30, 1973

RUCKELSHAUS SCORES LABEL OF SECRECY ON A-TEST NOTE

By E. W. Kenworthy

Special to The New York Times

Washington, Sept. 1—William D. Ruckelshaus, administrator of the Environmental Protection Agency, says that there is no substantive reason for classifying as top secret his recommendations to a Presidential committee on the underground nuclear test scheduled for early next month on Amchitka Island.

"There was nothing in my comments that needs to be stamped 'top secret,' " he told reporters yesterday.

His comments and recommendations were made in a letter to John N. Irwin 2d, Under Secretary of State, who is chairman of the Under Secretaries Committee. President Nixon, in June, 1969, directed his committee to review the underground test program of the Atomic Energy Commission.

In this capacity, the Irwin committee transmitted to the President last July 17 a top secret memorandum and report on the proposed five-megaton blast to test an antimissile warhead for the Spartan missile, the long-range interceptor in the Safeguard missile defense system.

The shot will be fired in a chamber carved out of solid basalt 6,000 feet below the surface of the Aleutian Island. Already, almost $200-million has been spent on digging two shafts and setting up instruments in the chamber.

Rumors Persist

Attached to the Irwin committee memorandum and report were several other documents, including letters from Mr. Ruckelshaus and Russell E. Train, chairman of the White House Council on Environmental Quality.

There have been persistent rumors in Washington that Mr. Ruckelshaus and Mr. Train recommended the cancellation of the test because of possible environmental damage.

It has been impossible to verify these rumors, however, because the Ruckelshaus and Train letters were classified "top secret" under a security practice known as "classification by association." This requires that any documents that could normally be unclassified become classified when they are attached to classified material.

Since the Irwin memorandum and report dealt with a highly classified weapons system, the Ruckelshaus and Train letters, dealing with possible environmental risks of the blast, also became classified when they were incorporated in "the package" sent to the President.

Ruckelshaus's View

In a breakfast meeting with reporters yesterday, Mr. Ruckelshaus was asked whether he thought that his letter needed to be classified. He replied:

"The document I received [from Mr. Irwin for comment] was marked 'top secret.' I was informed my comment should be 'top secret.' There was nothing in my comment that needs to be stamped 'top secret.' "

Quite apart from the question of classification of his comments to the Under Secretaries Committee, Mr. Ruckelshaus is required by law to comment publicly in writing on the environmental impact of any proposed Federal project. This requirement is contained in the Clean Air Act of 1970.

Mr. Ruckelshaus has not made such public comment. He was not available to answer questions on why he had not done so.

Many environmental groups, several scientists and a fairly large body of Congressmen have urged cancellation of the Amchitka project, expressing fears that the blast—equivalent to five million tons of TNT—might trigger an earthquake in an area of geologic faults, start a seismic tidal wave known as a "tsunami," leak radiation into the air or water and kill otters, sea lions, seals and birds.

However, the Atomic Energy Commission, with the support of many scientists, has insisted that such hazards are remote.

Suit Dismissed

Last Friday, Federal District Court Judge George L. Hart in Washington dismissed a suit brought by 33 members of Congress who sought a court order to force the publication of the Irwin report and the attachments.

It was the contention of the Congressmen that such publication was required by the Freedom of Information Act; that there was reason to believe the withheld documents warned of environmental damage from the blast, and they needed the information in the report to perform their legislative duties.

Judge Hart, however, asserted that "some things have got to be secret." He held that the material sought by the Congressmen rightfully came under the exemption in the Freedom of Information Act of matter relating to the nation's security.

On Monday, Judge Hart ruled for the Government in another suit brought by eight environmental and antinuclear testing organizations. They sought an injunction against the test on the ground that the Atomic Energy Commission had violated the National Environmental Policy Act by submitting to the Council on Environmental Quality an "environmental impact" statement that did not meet the law's requirements.

[Certificate of Service Omitted in Printing]

[Title Omitted in Printing]

OPPOSITION OF APPELLEES TO APPELLANTS' MOTION FOR SUMMARY REVERSAL, IN CAMERA EXAMINATION, EXPEDITED CONSIDERATION, AND ORAL ARGUMENT

[Filed September 10, 1971]

Appellees object to appellants' motion for summary reversal, *in camera* examination, expedited consideration, and oral argument for the following reasons:

1. Appellant's have failed to show that there are present any circumstances justifying taking this particular civil appeal up for special, expedited consideration. There is no urgency in this matter sufficient to warrant such an extraordinary course of action. Appellants rely upon affidavits executed by four Congressmen "stating that they believed they needed" the records appellants seek "for a legislative purpose." (Memorandum in support of appellants' motion for summary reversal, etc., page 5). But such an assertion is surely no adequate reason for treatment of the appeal as an "emergency matter."

2. Moreover, singling this appeal out for preferential or accelerated consideration would seem to us to require a showing of a probability of reversal of the District Court's dismissal of the action. But appellants have not—and indeed cannot—make any such showing. To the contrary, it is clear that the dismissal was entirely correct. Insofar as appellants seek to maintain the action in their capacity as Members of Congress, the action presents non-justiciable questions and may not be maintained under the doctrine of Separation of Powers. In addition, each of the documents appellants seek is explicitly exempted from the disclosure requirements of 5 U.S.C. 552, the Act appellants rely upon, because each is classified secret or higher by Executive Order 10501, as amended, and by 5 U.S.C. 552(b)(5) as internal memoranda not otherwise available.

(a) Appellants assert that they are entitled to sue in their

capacity "as Members of Congress" basing their contention on averments such as "[t]he refusal of the Executive Branch to provide this information to a co-equal branch of the United States Government graphically illustrates the difficulties Congress faces in carrying out its legislative responsibilities." (Represenetative Mink's Affidavit, Par. 20). But the doctrine of separation of the powers of the three branches of our Federal Government is a keystone of our constitutional system, and requires "that the acts of each shall never be controlled by, or subjected, directly or indirectly, to the coercive influence of either of the other departments." *O'Donoghue* v. *United States,* 289 U.S. 516, 530 (1933). Thus, the manner in which the Executive Branch should cooperate with the Legislative Branch of our Government, or, as in this case, with individual Congressmen, is plainly not a proper subject for judicial scrutiny. This necessarily follows here from the fact that there is "a textually demonstratable constitutional commitment of the issue to a coordinate political department." *Baker* v. *Carr,* 369 U.S. 186, 217 (1962).

(b)(i) Each of the documents appellants seek is classified secret or higher by Executive Order 10501, as amended. (Under Secretary Irwin's Affidavit, Pars. 5, 6). 5 U.S.C. 552(b)(1) authorizes withholding of documents so classified. *Epstein* v. *Resor,* 421 F.2d 930 (9th Cir. 1970) *cert. denied,* 398 U.S. 965.

(ii) Appellants describe the records they seek as "recommendations to the President." (Representative Mink's Affidavit, Par. 19). Indeed, "they were prepared and used solely for transmittal to the President as advice and recommendations." (Under Secretary Irwin's Affidavit, Par. 5). The power to receive confidential advice regarding a subject of concern, such as proposed nuclear tests, is plainly a part of the power vested in the President by Article II of the Constitution. This brings the documents "within a statutory or constitutional exemption" to 5 U.S.C. 552. *Gary A. Soucie, et al.* v. *David,* — U.S. App. D.C. —, — F.2d — (April 13, 1971) (No. 24,573) (Slip Opinion, page 14).

Furthermore, the "recommendations to the President" appellants seek, including the choice of whatever factors each author considered appropriate to bring to the President's attention, are certainly within 5 U.S.C. 552 (b)(5) since Exemption 5 was enacted as "a clear expression of congressional policy to hold the line on disclosure of materials" "comprising part of a process by which governmental decisions and policies are formulated." *Freeman* v. *Seligson*, 132 U.S. App. D.C. 56, 405 F.2d 1326, 1339 (1968). *Accord: International Paper Co.* v. *Federal Power Commission*, 438 F.2d 1349, 1358-1359 (2nd Cir. 1971).[1]

Conclusion

For the foregoing reasons the Motion for Summary Reversal, In Camera Examination, Expedited Consideration, and Oral Argument should be denied.

Respectfully submitted,

/s/ Morton Hollander
MORTON HOLLANDER

/s/ Harland F. Leathers
HARLAND F. LEATHERS

/s/ Jeffrey Axelrad
JEFFREY AXELRAD
Attorneys, Department of Justice
Washington, D.C. 20530

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[1] *In camera* examination is unnecessary for the reasons stated above. *In camera* examination would be especially unwarranted and improper here since the Courts should not normally examine either classified documents, *Epstein* v. *Resor*, 421 F.2d 930, 933 (9th Cir. 1970), cert. denied 398 U.S. 965, or recommendations to the President. See *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 332 (D D.C., 1966), *affirmed per curiam* 128 U.S. App. D.C. 10, 384 F.2d 979, cert. denied 389 U.S. 952.

The opinion and judgment of the court of appeals of October 15, 1971, are printed at Pet. App. A and B.

SUPREME COURT OF THE UNITED STATES

No. 71-909 October Term, 19..

ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS,

v.

PATSY T. MINK, ET AL.

ORDER ALLOWING CERTIORARI. Filed March 6, 1972.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia. Circuit is granted.

☆ U.S. Government Printing Office: 1972—463-097/660

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71–

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
PETITIONERS

v.

PATSY T. MINK, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Environmental Protection Agency and other named appellees in the court below, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 21–29) is not yet reported. The order of the district court (Appendix C, *infra*, pp. 32–33) is unreported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 31) was entered on October 15, 1971. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

The Freedom of Information Act exempts from its disclosure requirements certain categories of government documents. The questions presented are:

1. Whether the district court may make an *in camera* inspection of documents exempt from disclosure under 5 U.S.C. 552(b)(1) because they are "required by Executive order to be kept secret in the interest of the national defense or foreign policy," for the purpose of releasing portions of such documents which it finds to be "non-secret components."

2. Whether the district court may review *in camera* documents exempt from disclosure under 5 U.S.C. 552(b)(5) because they are inter-agency memoranda, for the purpose of selecting and making available to the public portions of such memoranda which the court determines are "factual" and not "inextricably intertwined with policymaking processes."

STATUTE AND EXECUTIVE ORDER INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, provides in pertinent part:

> (a) Each agency shall make available to the public information as follows:
>
> * * * * *
>
> (3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the

extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant.

* * * * *

(b) This section does not apply to matters that are—

(1) specificially required by Executive order to be kept secret in the interest of the national defense or foreign policy;

* * * * *

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

Executive Order 10501, as amended, 3 C.F.R. 292 (Jan. 1, 1971), provides in pertinent part:

SECTION 1. *Classification categories.* Official information which requires protection in the interests of national defense shall be limited to three categories of classification, which in descending order of importance shall carry one of the following designations: Top Secret, Secret, or Confidential. No other designation shall be used to classify defense information, including military information, as requiring protection in the interests of national defense, except as expressly provided by statute. * * *

* * * * *

SEC. 3. *Classification.* Persons designated to have authority for original classification of information or material which requires protection in the interests of national defense under this order shall be held responsible for its proper classification in accordance with the definitions of the three categories in section 1, hereof. Unnecessary classification and over-classification shall be scrupulously avoided. The following special rules shall be observed in classification of defense information or material:

(a) *Documents in General.* Documents shall be classified according to their own content and not necessarily according to their relationship to other documents. References to classified material which do not reveal classified defense information shall not be classified.

(b) *Physically Connected Documents.* The classification of a file or group of physically connected documents shall be at least as high as that of the most highly classified document therein. Documents separated from the file or group shall be handled in accordance with their individual defense classification.

(c) *Multiple Classification.* A document, product, or substance shall bear a classification at least as high as that of its highest classified component. The document, product, or substance shall bear only one over-all classification, notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications.

(d) *Transmittal Letters.* A letter transmitting defense information shall be classified at least as high as its highest classified enclosure.

STATEMENT

Respondents, who are 33 members of Congress, brought this action under the Freedom of Information Act, 5 U.S.C. 552, to compel the release to them of documents prepared for the use of the President in connection with the underground nuclear test scheduled for Amchitka Island, Alaska.[1] The government moved to dismiss the action, or in the alternative for summary judgment, on the ground that the requested materials were specifically exempted from disclosure under 5 U.S.C. 552(b)(1) and (5) (Exemptions 1 and 5). Exemption 1 excludes from disclosure matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." Exemption 5 excludes "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

In support of its motion the government filed an affidavit of Under Secretary of State John N. Irwin, II. He stated that in January, 1969 the President established a Committee known as the "Under Secretaries Committee", which was chaired by Mr. Irwin and which is a constituent part of the National Security Council System. The affidavit described the assignment given by the President to the Under Sec-

[1] A separate action, brought in the district court to enjoin the test itself, was before this Court on an application for an injunction. *Committee for Nuclear Responsibility, Inc.* v. *Schlesinger*, O.T. 1971, No. A–483. The Court denied the injunction on November 6, 1971 (40 U.S.L.W. 3214) and the Amchitka test was conducted on that date.

retaries Committee in connection with the annual underground test program as follows:

> 3. On June 27, 1969, the President directed the Under Secretaries Committee to review the annual underground nuclear test program and to encompass within this review requests for authorization of specific scheduled tests. He directed that the Committee consider the policy and technical justification for the proposed tests to determine whether they are consistent with the requirements of national security and foreign policy. He requested that the results of the Committee's review of the underground nuclear tests programs and its recommendations be transmitted to him in time to allow him to give them full consideration before the scheduled events.

Pursuant to the presidential direction, the Under Secretaries Committee prepared a report for the underground test "Cannikin" which was the test conducted at Amchitka Island. The documents in the report, as described in pargraph 5 of the affidavit, are:

> A. A memorandum prepared by me to the President dated July 17, 1971. This memorandum is classified as Top Secret and as Restricted Data.
>
> B. Attached to that memorandum to the President was a report of the Under Secretaries Committee on the proposed Cannikin test. This report is classified Top Secret and as Restricted Data. The following documents were attached to this report:
>
> 1. A letter from the Chairman of the Atomic Energy Commission to the Chairman of the

Under Secretaries Committee, myself. This letter is separately classified Secret and separately as Restricted Data.

2. A report of the Defense Program Review Committee, the Chairman of which is Dr. Henry Kissinger. This report is separately classified as Top Secret and separately as Restricted Data.

3. The Environmental Statement Cannikin, dated June 1971, by the United States Atomic Energy Commission. This document is publicly available and a copy is attached as Exhibit C.

4. A transcript of a briefing by the Atomic Energy Commission on Cannikin given orally to the Under Secretaries Committee. This document is separately classified as Secret and separately as Restricted Data; and

5. A memorandum to me from the Council on Environmental Quality. This memorandum is an attachment to the classified report and is separately unclassified.

C. In addition, letters containing recommendations were transmitted to me regarding the proposed test known as Cannikin by Mr. William D. Ruckelshaus for the Environmental Protection Agency, by Mr. Russell Train, for the Council on Environmental Quality and by Dr. Edward E. David, Jr., for the Office of Science and Technology. Each of these three letters is classified Top Secret and as Restricted Data.

The documents described in this paragraph, except for item B3 above, were prepared solely for the purpose of giving advice to the President and involve, except for item B5 above,

> highly sensitive matter that is vital to our national defense and foreign policy. They were prepared and used solely for transmittal to the President as advice and recommendations and set forth the views and opinions of the individuals and agencies preparing the documents so that the President might be fully apprised of varying viewpoints and have been used for no other purpose.

Mr. Irwin's affidavit also noted that the documents described as "Top Secret" and "Secret" had been classified pursuant to Executive Order No. 10501, and that those described as Restricted Data had been classified pursuant to The Atomic Energy Act of 1954 (42 U.S.C. (y), 2161, and 2162).

The district court held that the requested documents were "exempted from compelled disclosure by 5 U.S.C. 552(b)(1) and * * * 5 U.S.C. 552(b)(5)." Accordingly it granted the government's motion for summary judgment, and dismissed the action.[2]

The court of appeals reversed and remanded the case to the district court to inspect the documents *in camera* and to determine whether disclosure should be ordered as to any of the materials in the report. Noting that "[s]ecrecy by association is not favored," the court of appeals directed disclosure of any "non-secret" portions of the documents classified pursuant to Executive Order 10501 "[i]f the non-secret components are separable from the secret remainder and may be read sepa-

[2] The district court also dismissed plaintiffs' action insofar as they sought relief in their official capacity. The court of appeals did not rule on that aspect of the case, and it is not germane to the issues presented in the present petition.

rately without distortion of meaning[.]"[3] (Appendix A. infra, p. 27). In addition, the court ordered that the documents which the government claimed to be within the inter or intra-agency memoranda Exemption 5 of the Act, were to be reviewed *in camera* for disclosure "of factual information unless it is inextricably intertwined with policy making processes"[4] (Appendix A. *infra,* p. 28).

REASONS FOR GRANTING THE WRIT

This case presents important and recurring questions concerning the proper role of the courts in suits brought under the Freedom of Information Act.[5] That Act generally makes government records available for public inspection.

---

[3] The court noted that Section 3(c) of Executive Order 10501 provides for "only one over-all classification, notwithstanding that pages, paragraphs, sections or components thereof bear different classifications." That provision also directs that the document should bear the classification "at least as high as that of its highest component." (App. A, *infra*, p. 27.)

[4] The court of appeals also held that documents which, although attached to a classified file, were not independently classified, are not within the exemption for secret material. We do not challenge in this petition that aspect of the decision below.

[5] The fact that respondents are members of Congress has no bearing on their statutory right to release of the documents in question. Under the Act a document which is required to be released at all, must be released to "any person". 5 U.S.C. 552 (a)(3); S. Rep. No. 813, 89th Cong., 1st Sess. 5; H. Rep. No. 1497, 89th Cong., 2d Sess. 10; *Sterling Drug Co.* v. *F.T.C.* (C.A.D.C., No. 24,878, decided September 22, 1971), slip op. 9–11; Davis, *Administrative Law Treatise*, 1970 Supplement, Chapter 3A, § 3A.4, pp. 120–122.

The Act specifies, however, nine categories of documents to which the disclosure requirements do not apply. Two of these exempt categories are applicable to the material for which disclosure is sought in this case—Exemption 1, which covers material "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy", and Exemption 5, which covers "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. 552 (b)(1), (5). At issue here is whether the courts may undertake *in camera* inspection of documents which need not be disclosed by virtue of these exemptions for the purpose of determining whether portions of those documents ought to be released. The holding below directs judicial inquiry into matters which are peculiarly within the province of the Executive and is inconsistent with the language and purposes of Exemptions 1 and 5. If sustained, this holding would create serious problems for the executive branch of the government. Accordingly, review by this Court is warranted.[6]

[6] As the result of discovery proceedings in the separate action (discussed *supra*, n. 1) seeking to enjoin the test (*The Committee for Nuclear Responsibility, Inc., et al.* v. *Seaborg* (D.D.C., Civil Action No. 1346–71), some of the documents involved in the present case (with certain deletions)) have already been made public. As to the material which has now been made public, we do not seek any relief from this Court.

1. *The Exemption for Secret Material (Exemption 1).*

Exemption 1 exempts from disclosure "matters * * * specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy". 5 U.S.C. 552 (b)(1). The materials for which this Exemption is claimed here are the documents classified "Secret" or "Top Secret" pursuant to Executive Order 10501. The pertinent legislative history makes it clear that Exemption 1 was specifically intended to protect from disclosure records which are classified pursuant to Executive Order 10501. See, *E.g.*, H. Rep. 1497, 89th Cong., 2d Sess. 9–10; 112 Cong. Rec. 13659 (Rep. Gallagher).[7] Representative Moss, Chairman of the House Government Information Subcommittee, stated, during Hearings Before a Subcommittee of the House Committee on Government Operations, on H.R. 5012, *et al.*, 89th Cong., 1st Sess., Part 1, March 30, 1965, pp. 14–15, that:

> We do not challenge that right to withhold for the national interest, because we specifically require it by Executive order to be kept secret in the interest of the national defense or foreign policy. Now, that is very broad. That means that any of these documents that are of sufficient significance to the security of this Nation or to the interests of this Nation as it deals with other

[7] Representative Moss also stated during the House hearings that 5 U.S.C. 552(b)(1) "was intended to specifically recognize that Executive order [No. 10501]" (*id.* at 52), and is drafted "in conformity with that Executive order" (*id.*, April 1, 1965, at 105).

> nations can, by appropriate designation, be excluded from the provisions of this act.
>
> We recognize that there are going to be certain needs to keep some of this information locked up. And the Executive order which is applicable in this instance I believe is Executive Order 10501, where the President authorizes the departments and agencies to appropriately classify and lays out the guidelines for classification * * *.

Contrary to the view of the court of appeals, Exemption 1 protects from disclosure a document that is classified pursuant to an executive order regardless of the fact that certain pages or paragraphs of that document might not, standing alone, require clasification. The language of the statute in no way implies that courts are empowered to determine whether parts of a document that is entirely exempt from disclosure as a result of the executive order can nonetheless be ordered disclosed on the basis of a court's judgment as to what portions, if any, may safely be disclosed without adversely affecting national defense or foreign policy. Executive Order 10501 specifies that "The document, * * * shall bear only one over-all classification, notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications." (Section 3(c)). Accordingly, the documents in question here are exempt in their entirety under the statute.

This construction of Exemption 1 is consistent with longstanding principles of judicial restraint under which this Court has refused to review the discretion

of the Executive in the areas of national defense and foreign relations.[8]

As Mr. Justice Stewart recently explained (*New York Times Co.* v. *United States*, 403 U.S. 713, 728–729, concurring opinion):

> If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of

---

[8] See, *e.g.*, *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111, where the Court stated:

> * * * The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly rsesponsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

See also *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 320–322; *Johnson* v. *Eisentrager*, 339 U.S. 763, 789; *Orloff* v. *Willoughby*, 345 U.S. 83; *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317–318.

internal security necessary to exercise that power successfully. * * * [I]t is clear to me that it is the constitutional duty of the Executive—as a matter of sovereign prerogative and not as a matter of law as the courts know law—through the promulgation and enforcement of executive regulations to protect the confidentiality necessary to carry out its responsibilities in the fields of international relations and national defense.[9]

[9] In *Moss* v. *Laird* (D.D.C., Civil Action No. 1254–71) and *Fisher* v. *Department of Defense* (D.D.C., Civil Action No. 1865–71) both decided December 7, 1971, the district court (*per* Judge Gesell) held that certain portions of the Pentagon Papers which had been classified pursuant to Executive Order 10501 (and had not been made public) were exempt from disclosure under the Freedom of Information Act by virtue of Exemption 1. In rejecting even *in camera* inspection the court stated (Slip op. 3–4):

> ... The determination of the interests of national defense or foreign policy cannot be made by applying some simple litmus test to a document presented, particularly in a case such as this where good faith is not in issue. The Court, with no experience or background in such matters, would require detailed *ex parte* background briefing even to make a tentative judgment and thus the litigation would proceed in secret with those seeking the data wholly excluded.
>
> The Freedom of Information Act was not designed to open all Government files indiscriminately to public inspection. Obviously documents involving such matters as military plans and foreign negotiations are peculiarly the type of documents entitled to confidentiality. The orderly processes of government and indeed the stability of the country itself so require. Congress recognized this in the Act and the Constitution has no requirement to the contrary. . . .

Indeed, it is difficult to imagine what feasible criteria the courts could apply in determining whether portions of a classified document may be released.

In *Epstein* v. *Resor*, 421 F. 2d 930 (C.A. 9), certiorari denied, 398 U.S. 965, the Ninth Circuit held that Exemption 1 applied to a file classified pursuant to Executive Order 10501 and declined to order *in camera* inspection. The court rejected the reasoning espoused by the D.C. Circuit here that it is appropriate for judges to evaluate independently the need to classify material in the interest of national security. The court noted that (*id.* at 933).

> * * * The function of determining whether secrecy is required in the national interest is expressly assigned to the executive. The judicial inquiry is limited to the question whether an appropriate executive order has been made as to the material in question.

No court other than the court below has suggested that it is appropriate for judges to determine in a suit brought under the Freedom of Information Act whether various portions of a classified document ought to be released.

2. *The Exemption for Inter- or Intra-Agency Memoranda (Exemption 5).*

The court of appeals also ordered the district court to make an *in camera* inspection of the materials for which Exemption 5 is claimed, for the purpose of releasing "factual information" which is not "inextricably intertwined with policymaking processes." Exemption 5 protects materials which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency". This language contains no suggestion that the exemption applies only to non-factual parts of internal memoranda.

Indeed, the legislative history of Exemption 5 shows that Congress rejected such a limitation on the Exemption. An earlier draft of the Bill which ultimately became the Freedom of Information Act limited the Exemption to "intra-agency or interagency memorandums or letters dealing solely with matters of law or policy". This language was intended to make available "[a]ll *factual* material in Government records * * *" S. Rep. No. 1219, 88th Cong., 2d Sess. 6–7, 17 (Emphasis in the original). In response to criticism that the exemption as then drafted was not broad enough and that it should encompass both factual material and opinions contained in internal memoranda,[10] the earlier language was deleted in favor of

[10] See, *e.g.*, Hearings on S. 1160, S. 1336, S. 1758, and S. 1879 before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, 89th Cong., 1st Sess. (May, 1965) 36; 94–95; 112–113; 205; 236–237, 244; 366–367; 402–403; 417; 437, 450. Hearings Before a Subcommittee of the House Committee on Government Operations, on H.R. 5012, *et al.*, 89th Cong., 1st Sess., Part 1, March and April, 1965, pp. 223–224; 229–230; 240; 256.

the present text, with the express purpose of guaranteeing "frank discussion of legal or policy matters" by governmental officials. S. Rep. No. 813, *supra*, at 9.

As the legislative history and the decided cases indicate, the internal memoranda and letters which fall within Exemption 5 are those which contain advice and recommendations on matters of policy, and as such would not "routinely" be subject to discovery in litigation. See, *e.g.*, H. Rep. No. 1497, 89th Cong., 2d Sess. 10; *Sterling Drug, Co.* v. *Federal Trade Commission* (C.A.D.C., No. 24,878, decided September 22, 1971), slip op., pp. 9–11. Essentially, the protection afforded by Exemption 5 is based upon "two important policy considerations * * *: encouraging full and candid intra-agency discussion, and shielding from disclosure the mental processes of executive and administrative officers." *International Paper Co.* v. *Federal Power Commission*, 438 F. 2d 1349, 1358–1359 (C.A. 2). See also H. Rep. No. 1497, 89th Cong., 2d Sess. 10; S. Rep. No. 813, 89th Cong., 1st Sess. 9; *Ackerly* v. *Ley*, 420 F. 2d 1336, 1341 (C.A.D.C.).

We submit that Congress intended to assure candid and complete internal discussion of all aspects of sensitive governmental problems, including the factual discussion upon which advice is predicated. Indeed, the distinction for these purposes between factual matters and matters related to the "policymaking process," is highly unrealistic, for the selection and presentation of factual background bearing on a particular decision is virtually certain to be "inextricably bound" with the decision-making process. The documents under con-

sideration in this case were prepared "solely for the purpose of giving advice to the President" in connection with his decision whether to carry out a nuclear test. As Congress recognized in enacting Exemption 5, the President and other executive decision makers would be severely disadvantaged if their staff personnel and advisors were required to "operate in a fishbowl" with respect to the material they select for presentation in internal memoranda. S. Rep. No. 813, *supra*, at 9.[11]

[11] The court below appears to have relied in part upon the rule it has applied in the discovery context that factual reports in government files may be subject to discovery in litigation. See, *Boeing Airplane Co.* v. *Coggeshall*, 280 F. 2d 654, 662 (C.A.D.C.); *Machin* v. *Zuckert*, 316 F. 2d 336 (C.A.D.C.), certiorari denied, 375 U.S. 896. Cf. *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318 (D.D.C.), affirmed, 384 F. 2d 979 (C.A.D.C.), certiorari denied, 389 U.S. 952; *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939 (Ct. Cl., *per* Mr. Justice Reed). The court below has made this same distinction in other Information Act cases. See, *e.g.*, *Soucie* v. *David*, 448 F. 2d 1067, 1077–1078 (involving the Garwin Report on the SST); *Bristol-Myers Co.* v. *Federal Trade Commission*, 424 F. 2d 935, 939 (involving Commission reports compiled in connection with a rule-making proceeding). This rule, however, does not apply to materials, such as those in question here, which are entirely advisory in nature. See, *e.g.*, *Boeing Airplane Co* v. *Coggeshall*, *supra*; *Machin* v. *Zuckert*, *supra*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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L. PATRICK GRAY, III,
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JANUARY 1972.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

No. 71-1708

PATSY T. MINK, ET AL., APPELLANTS

v.

ENVIRONMENTAL PROTECTION AGENCY, WILLIAM D. RUCKELSHAUS, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY

On Appellants' Motion for Summary Reversal

Decided October 15, 1971

Mr. Ramsey Clark, with whom *Mr. Kenneth C. Bass, III,* was on the motion, for appellants.

Mr. Jeffrey Axelrad, Attorney, Department of Justice, with whom *Messrs. Morton Hollander* and *Harland F. Leathers,* Attorneys, Department of Justice, were on the opposition to the motion, for appellees.

Before FAHY, *Senior Circuit Judge,* and LEVENTHAL and WILKEY,* *Circuit Judges.*

Per Curiam: This is a suit brought by 33 members of Congress, in both their official and private capacities, under the Freedom of Information Act (FOIA), 5 U.S.C. 552 (1970), to obtain several documents pertaining to an underground nuclear test

* Circuit Judge Wilkey did not participate in the consideration of this case.

exposion which had been scheduled to take place on Amchitka Island, Alaska.[1]

Priority is given by the Act to such suits in the District Court, see 5 U.S.C. 552(a)(3) (1970). In accordance with this Congressional policy, we provide comparable expedition in the appellate court.

I

Appellees, who were defendants in the District Court, admit the existence of the documents in question, which are concerned with the environmental, national defense, and foreign relations consequences of the planned test. The documents were prepared in report form by a special committee chaired by Honorable John Irwin, Undersecretary of State. The Committee was established by the President on January 20, 1969, and is part of the National Security Council system. The President, on June 27, 1969, directed the Committee to review the annual underground nuclear test program. Pursuant to this direction the Committee prepared a report on the Alaskan nuclear test (code-named Cannikin).

As a result of an apparent leakage of certain portions of the report that suggested some agency disapproval of the test, Representative Patsy Mink asked the White House for copies of the report. The request was denied and this suit followed, with 32 other Members of Congress joining Representative Mink as plaintiffs. They sought summary judgment to compel disclosure of the requested documents. Appellees, de-

[1] The test was originally scheduled for October, 1971, but Congress has provided that it may not take place sooner than May, 1972, unless the President gives his direct approval for an earlier date. *Cf. The Committee For Nuclear Responsibility, Inc. v. Seaborg*, No. 71-1732, October 5, 1971.

fendants, filed an answer, a supporting affidavit executed by Undersecretary Irwin, and a motion to dismiss or in the alternative for summary judgment. A hearing was held on August 27, 1971, before the District Court. The District Court thereafter entered an order which dismissed the complaint insofar as plaintiffs sought to maintain their action in their capacity as Members of Congress, on the ground that they failed to state a justiciable case by virtue of the Separation of Powers doctrine. Insofar as plaintiffs proceeded in their private capacity, the District Court refused to compel disclosure on the grounds that the documents fell within two of the nine exemptions contained in the FOIA, 5 U.S.C. 552(b)(1) (national defense and foreign affairs secrets) and 5 U.S.C. 552 (b)(5) (inter-agency memoranda). Plaintiffs, appellants, noted an appeal, and now move in this court for summary reversal.

II

Congress tailored the Freedom of Information Act to require federal agencies to make information available to any person, unless that information must be withheld for a purpose that Congress deemed paramount to disclosure. Those matters requiring secrecy have been defined in nine exemptions to free disclosure. The two exemptions at issue in this case permit withholding of matters if they are: "(1) specifically required by Executive order to be kept secret in the interest of national defense or foreign policy . . . (5) inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than an agency in litigation with the agency."[2]

The Freedom of Information Act post-dates a 1953 Executive Order—No. 10501—that provides for classi-

[2] 5 U.S.C. 552(b)(1), (5).

fication of matters relating to national defense.[3] The legislative history of the Act does not define clearly the relationship between this Executive Order and the exemption of national defense and foreign affairs secrets of 5 U.S.C. § 552(b)(1). Since the passage of the Act, the Executive Order has continued to be the authority for classification of matters relating to national defense. Appellants argue that the national defense and foreign affairs secrets exemption requires each and every document that an agency wishes to withhold to be classified by separate Executive Order and not by the present classification procedure. After examining the various interpretations given this exemption,[4] we conclude that summary disposition of this issue by this court is inappropriate, and should be the subject of a full consideration on the merits by this court if the appeal is continued following the disposition on remand.

We do conclude, however, that summary disposition is appropriate in part, for the purpose of remand, on two of the matters before us.

1. The critical paper before us is the affidavit of Undersecretary Irwin, and particularly its paragraph 5.[5] We note first his statement that the documents in

[3] 3 C.F.R. 292 (1970).

[4] *Compare Epstein* v. *Resor*, 421 F.2d 930, 933 (9th Cir. 1970), *cert. denied*, 398 U.S. 965 (1970). SEN. REP. 813, 89th Cong., 1st Sess. (1965) at 8. *with* H.R. REP. 1497, 89th Cong., 1st Sess. (1966) at 9–10, DEPT. OF JUSTICE, ATTORNEY GENERAL'S MEMORANDUM ON THE PUBLIC INFORMATION SECTION OF THE A.P.A. (1967) at 30.

[5] 5. "In accordance with the foregoing directions from the President, the Under Secretaries Committee has prepared a report upon the proposed underground nuclear test known as Cannikin consisting of the following:

A. A memorandum prepared by me to the President dated

question include a memorandum from the Council on Environmental Quality to Undersecretary Irwin which is attached to the classified report, but "is separately unclassified." Appellees' justification for

July 17, 1971. This memorandum is classified as Top Secret and as Restricted Data.

B. Attached to that memorandum to the President was a report of the Under Secretaries Committee on the proposed Cannikin test. This report is classified Top Secret and as Restricted Data. The following documents were attached to this report:

1. A letter from the Chairman of the Atomic Energy Commission to the Chairman of the Under Secretaries Committee, myself. This letter is separately classified Secret and separately as Restricted Data.

2. A report of the Defense Program Review Committee, the Chairman of which is Dr. Henry Kissinger. This report is separately classified as Top Secret and separately as Restricted Data.

3. The Environmental Statement Cannikin dated June, 1971, by the United States Atomic Energy Commission. This document is publicly available and a copy is attached as Exhibit C.

4. A transcript of a briefing by the Atomic Energy Commission on Cannikin given orally to the Under Secretaries Committee. This document is separately classified as Secret and separately as Restricted Data; and

5. A memorandum to me from the Council on Environmental Quality. This memorandum is an attachment to the classified report and is separately unclassified.

C. In addition, letters containing recommendations were transmitted to me regarding the proposed test known as Cannikin by Mr. William D. Ruckelshaus for the Environmental Protection Agency, by Mr. Russell Train, for the Council on Environmental Quality and by Dr. Edward E. David, Jr., for the Office of Science and Technology. Each of these three letters is classified Top Secret and as Restricted Data.

The documents described in this paragraph, except for item B3 above, were prepared solely for the purpose of giving advice to the President and involve, except for item B5 above, highly sensitive matter that is vital to our national defense

this bunching of all appendanges according to the highest classification of the document to which they are attached is based on the following paragraph of section three of Executive Order 10501:[6]

> (b) *Physically Connected Documents.* The classification of a file or group of physically connected documents shall be at least as high as that of the most highly classified document therein. Documents separated from the file or group shall be handled in accordance with their individual defense classification.

This court sees no basis for withholding on security grounds a document that, although separately unclassified, is regarded secret merely because it has been incorporated into a secret file. To the extent that our position in this respect is inconsistent with the above-quoted paragraph of Section 3 of Executive Order 10501, we deem it required by the terms and purpose of the FOIA, enacted subsequently to the Executive Order.

The papers before us contain an assertion, based on an account in the New York Times, that the only reason for the Secret classification of the recommendation transmitted to Undersecretary Irwin by William D. Ruckelshaus, Administrator of the Environmental Protection Agency, is an instruction put on the basis that the entire file would be classified Secret. We take note that Undersecretary Irwin's affidavit identifies certain items (B 1, 2 and 4) as "separately classified,"

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and foreign policy. They were prepared and used solely for transmittal to the President as advice and recommendations and set forth the views and opinions of the individuals and agencies preparing the documents so that the President might be fully appraised of varying viewpoints and have been used for no other purpose."

[6] 3 C.F.R. 295 (1970).

but no such statement is made as to the letter from the Administrator of E.P.A., or from Russell Train, Chairman of the Council on Environmental Quality, or from Dr. Edward E. David, Jr., for the Office of Science and Technology. This is not a case where the mere disclosure of the fact of the inquiry is itself secret.

However, we do not think that a matter as important as this is to be determined on the basis of Undersecretary Irwin's affidavit as it stands. Under our remand, the District Court will take evidence on whether, and to what extent, the file contains documents that are now within the umbrella of a secret file but which would not have been independently classified as secret. Such documents are not entitled to the secrecy exemption of subdivision (b)(1) solely by virtue of their association with separately classified documents.

The following provision of Executive Order 10501 requires our attention since it is likely to be involved on remand:

> (c) *Multiple Classification.* A document, product, or substance shall bear a classification at least as high as that of its highest classified component. The document, product, or substance shall bear only one over-all classification, notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications.

The same reasoning applies to this provision as to the one dealing with physically-connected documents. Secrecy by association is not favored. If the non-secret components are separable from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed.

2. Similar treatment must be accorded on remand with respect to the Government's claim for exemption under subdivision (b)(5). The Court has recently considered that exemption in *Soucie* v. *David,* No. 24,573, April 13, 1971, and there is no need to review that opinion at length. It suffices to say that while the exemption protects the decisional processes of the President, or other policy-making executive officials, it does not prevent the disclosure of factual information unless it is inextricably intertwined with policymaking processes.[7]

III

We turn to the procedure to be followed by the District Court in carrying out the terms of our remand. In approaching this problem we have in mind the very special place the President occupies in the conduct of foreign affairs, both traditionally and constitutionally, apart from his additional responsibilities in connection with the national defense. In the exemption from disclosure contained in Section 552(b)(1) Congress has recognized the need for protection of the channels of communication and advice to the President in both these respects which are involved in the present litigation. Accordingly, *in camera* consideration of the documents by the District Court, looking toward their possible separation for purposes of disclosure or nondisclosure, is necessary, else the possibility of nondisclosure under the guides we have stated would be defeated. Moreover, although we have held in *Soucie v. David, supra,* that the policy of the Act requires that the exemptions from disclosure prescribed by FOIA be construed narrowly, this admonition must be tempered somewhat when the documents

[7] *Soucie* v. *David*, slip opinion at 18.

contain data supplied to the President with respect to nuclear explosions involving not only the national defense but the conduct of foreign affairs by the President in the context of such nuclear testing. In considering the documents also under the exemption granted by Section 552(b)(5) the District Court *in camera* will likewise have in mind, in possibly separating out factual data that can be disclosed without impinging on the policymaking decisional processes intended to be protected by this exemption, the sometimes delicate character of the responsibility of the President in the conduct of foreign affairs.

As already noted, this opinion does not deal with all the questions argued to us. It suffices that for the reasons noted the summary judgment denying all relief to plaintiffs must be reversed, and the case remanded forthwith for further consideration by the District Court.

So ordered.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-1708

PATSY T. MINK, ET AL., APPELLANTS

v.

ENVIRONMENTAL PROTECTION AGENCY, WILLIAM D. RUCKELSHAUS, ADMINISTRATOR ENVIRONMENTAL PROTECTION AGENCY

Civil Action 1614-71—September Term, 1971

Before: FAHY, Senior Circuit Judge, LEVENTHAL and WILKEY, Circuit Judges

ORDER

It is ORDERED by the Court, *sua sponte,* that footnote 1 in the opinion filed herein on October 15, 1971, is amended to read as follows:

[1] The test was originally scheduled for October 1971. Congress has provided that it may not take place unless the President gives his direct approval. Pub. L. No. 92-134, 85 Stat. 365 (1971). *Cf., The Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, No. 71-1732, October 5, 1971.

Per Curiam.

APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

No. 71–1703

PATSY T. MINK, ET AL., APPELLANTS

v.

ENVIRONMENTAL PROTECTION AGENCY,
WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY

Civil Action 1614–71—September Term, 1971

Before: FAHY, Senior Circuit Judge, and LEVENTHAL and WILKEY,* Circuit Judges.

ORDER

This case came on for consideration on appellants' motion for summary reversal and appellees' opposition to the motion, and the Court heard argument of counsel. On consideration of the foregoing, it is

ORDERED by this Court that the judgment of the District Court appealed from herein is hereby reversed, and this case is hereby remanded to the District Court for further consideration in accordance with the opinion of this Court filed herein this date.

The Clerk is directed to issue a copy of the opinion and a certified copy of this order to the District Court forthwith.

Per Curiam.

For the Court:

NATHAN J. PAULSON,
Clerk.

Dated: OCTOBER 15, 1971.

Opinion per curiam.

* Circuit Judge Wilkey did not participate in the consideration of this case.

APPENDIX C

United States District Court for the District of Columbia

PATSY T. MINK, ET AL., PLAINTIFFS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL., DEFENDANTS

Civil Action No. 1614–71

ORDER

This cause having come before the Court on plaintiffs' motions for preliminary injunction and summary judgment and defendants' motion to dismiss or, in the alternative, for summary judgment; upon consideration of the argument of counsel, the record and memoranda of the parties; and the Court being fully advised in the premises, it is by the Court this 27th day of August 1971,

ORDERED as follows:

(1) defendants' motion to dismiss is granted insofar as plaintiffs seek to maintain the action in their capacity as Members of Congress on the ground that plaintiffs have failed to present a justiciable case or controversy and they may not maintain the action in that capacity by reason of the Separation of Powers provisions of the Constitution;

(2) insofar as plaintiffs maintain this action as individuals, defendants' motion for summary judgment is granted on the grounds that each of the documents plaintiffs seek is exempted from compelled disclosure

by 5 U.S.C. 552(b)(1) and that each of the documents plaintiffs seek is exempted from compelled disclosure by 5 U.S.C. 552(b)(5);

(3) plaintiffs' motion for summary judgment is denied; and

(4) plaintiffs' motion for preliminary injunction is denied as moot; and, it is

FURTHER ORDERED that the action is hereby dismissed.

GEORGE L. HART, Jr.,
United States District Judge.

U.S. GOVERNMENT PRINTING OFFICE: 1972

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-909

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Petitioners

v.

PATSY T. MINK, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. In a suit to compel disclosure of information under the Freedom of Information Act, 5 U.S.C. § 552, where the government has already turned over most of the disputed materials to the district court for *in camera* inspection in a related litigation, should this

Court review the ruling of the court of appeals directing the district court to inspect those materials in this case?

2. In any event, where government agencies fail to meet their statutory burden of proving the materials exempt from disclosure, did the court of appeals correctly remand the case to the district court for an *in camera* inspection to determine the validity of the agencies' claims?

STATEMENT

The respondents are 33 duly elected and installed Members of the United States Congress. They commenced this suit under the Freedom of Information Act, 5 U.S.C. § 552,[1] to compel the petitioners[2] to disclose certain documents pertaining to an underground nuclear test, code-named "Cannikin," conducted at Amchitka Island, Alaska on November 6, 1971.

Before the district court, the petitioners admitted the existence of the documents sought. Those documents—numbering nine in all[3]—are reports, memo-

[1] The statute provides pertinently:

> "On complaint, the district court of the United States in the district . . . in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." § 552(a)(3).

[2] The petitioners are the Environmental Protection Agency and its administrator Ruckelshaus; the Council on Environmental Quality and its chairman Train; the Office of Science and Technology and its director David; and the Department of State, its secretary Rogers, and its undersecretary Irwin.

[3] A tenth document—the "impact statement" of the Atomic Energy Commission—has been publicly available at all pertinent times.

randa, or letters prepared in connection with a study of the Cannikin test by a committee under the chairmanship of the Undersecretary of State, John N. Irwin, II. Under the Act, the petitioners had the burden of proving their right to withhold the documents.[4] However, the petitioners resisted disclosure, claiming exemptions under the Act itself—(1) that the documents are "specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy," § 552(b)(1), and (2) that they are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency [from which disclosure is sought]," § 552(b)(5).

The petitioners moved for summary judgment, relying solely upon an affidavit submitted by the petitioner Irwin. That affidavit asserted that all except one of the nine documents "involve highly sensitive matter that is vital to our national defense and foreign policy," and that all of the disputed documents "were prepared solely for the purpose of giving advice to the President. . . ."

The Irwin affidavit did not purport to claim that each of the documents in question had been *specifically* kept secret by Executive order, as required by the statute. To the contrary, the affidavit suggested that the documents had been classified pursuant to Executive Order 10501—an order, promulgated in 1953, that establishes the general classification scheme for all executive agencies. Moreover, the affidavit suggested that at least some of the documents in question had

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[4] The Act provides pertinently: "The court shall determine the matter de novo and the burden is on the agency to sustain its action." § 552(a)(3).

been classified secret not because of their own contents, but because they were physically attached to other documents that had been so classified. That suggestion was strengthened by the subsequent admission of the petitioner Ruckelshaus, whose memorandum is one of the documents at issue here, that "nothing in [his] comment . . . needs to be stamped 'top secret.'"

Nor did the Irwin affidavit purport to claim that each—or any—of the documents in dispute consisted solely of recommendations for the President, rather than recommendations together with factual information.

The petitioners offered in evidence nothing besides the Irwin affidavit. Despite the deficiencies in their proof, the district court granted their motion for summary judgment on each of the two statutory grounds they had advanced. The court did so without examining the documents in question. It also dismissed the complaint on "separation of powers" grounds insofar as the respondents sought to maintain the action in their official capacities as Members of Congress; and it dismissed as moot the respondents' motion for summary judgment, based on the statutory claim that the exemptions in the Act have no application to them.[5]

On the respondents' expedited appeal, the court of appeals reversed and remanded the matter to the district court for further consideration. The court of appeals did not pass upon all the questions argued to it (Pet. 29). Rather, the court "conclude[d] that summary disposition . . . is inappropriate," and that

[5] Section 552(c) provides pertinently: "This section [552, including the exemptions in subsection (b)], is not authority to withhold information from Congress."

the issues argued by the parties "should be the subject of a full consideration on the merits by this court if the appeal is continued following the disposition on remand" (Pet. 24). Thus, it did not reach the question whether the respondents had standing to sue in their official capacity as Members of Congress, nor whether the Freedom of Information Act confers any greater rights to disclosure on Congressmen than it does on members of the public generally.[6] The court did not pass on the respondents' contention that the first exemption requires each document sought to be withheld to be classified by a separate Executive Order (Pet. 24).

The court of appeals decided two narrow issues. The first related to the petitioners' claim under the first exemption. Here the court noted the inadequacies of the Irwin affidavit. It thought that a matter as important as that involving the first exemption should not be determined on the basis of the Irwin affidavit as it stood. It directed the District Court to "take evidence on whether, and to what extent, the file [of withheld documents] contains documents that are now within the umbrella of a secret file but which would not have been independently classified as secret." On the same reasoning, it directed the trial court to determine whether "non-secret components [of documents] are separable from the secret remainder and may be read separately without distortion of meaning" (Pet. 27).

The second holding of the court of appeals directed similar treatment with respect to the petitioners'

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[6] Contrary to the petitioners' suggestion (Pet. 8, n. 2), these issues *are* germane on this petition, since their resolution in the respondents' favor by this Court would preclude a reversal of the judgment below.

claim under the fifth exemption. Here the court noted that "the exemption protects the decisional processes of the President, or other policy-making executive officials" (Pet. 28). The court ruled that it would extend that protection to factual information wherever "it is inextricably intertwined with policy-making processes" (*ibid.*) (footnote omitted).

The court of appeals demonstrated its awareness of the sensitivity of the materials at issue. "In approaching this problem," it said, "we have in mind the very special place the President occupies in the conduct of foreign affairs, both traditionally and constitutionally, apart from his additional responsibilities in connection with the national defense." Commenting on the first exemption, the court noted:

> "In the exemption from disclosure contained in Section 552(b)(1) Congress has recognized the need for protection of the channels of communication and advice to the President in both these respects which are involved in the present litigation . . . . Moreover, although we have held in *Soucie* v. *David* [448 F.2d 1067] . . . that the policy of the Act requires that the exemptions from disclosure prescribed by [the statute] . . . be construed narrowly, this admonition must be tempered somewhat when the documents contain data supplied to the President with respect to nuclear explosions involving not only the national defense but the conduct of foreign affairs by the President in the context of such nuclear testing" (Pet. 28-29).

With respect to the fifth exemption, the Court observed that the district court

> "will likewise have in mind, in possibly separating out factual data that can be disclosed without

impinging on the policymaking decisional processes intended to be protected by this exemption, the sometimes delicate character of the responsibility of the President in the conduct of foreign affairs" (Pet. 29).

To avoid unwarranted disclosure of the disputed materials, the court of appeals ordered an *in camera* inspection of the documents by the trial court, "else the possibility of *nondisclosure* under the guides . . . would be defeated" (Pet. 28) (emphasis supplied). Thus—contrary to the petitioners' suggestion—*in camera* inspection was ordered to protect the government from excessive disclosure. The court viewed the *in camera* process as a judicial restriction upon public access to documents held by the government—a restriction adopted to implement the disclosure requirements of the Act without revealing any materials that the government might be entitled to withhold.

ARGUMENT

I. THE CASE DOES NOT RAISE THE QUESTIONS SOUGHT TO BE PRESENTED

The petitioners urge that "[t]his case presents important and recurring questions concerning the proper role of the courts in suits brought under the Freedom of Information Act" (Pet. 9) (footnote omitted). The respondents respectfully disagree.

1. Most of the documents in dispute have already been reviewed *in camera* by the trial judge, the court of appeals, and this Court.

According to the petitioners, "At issue here is whether the courts may undertake *in camera* inspection of documents which need not be disclosed by virtue of [the first and fifth] . . . exemptions" (Pet. 10).

But that issue is no longer a live one with respect to the documents in dispute here. For the same district judge who refused to look at the nine disputed documents in this case on August 27, 1971, subsequently looked at all but three of them two months later. In *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, — F.2d — (C.A.D.C. Oct. 28, 1971) (No. 71-1854), the district court ordered the government to submit six of the nine documents here at issue for his personal *in camera* inspection.[7] Upon the government's interlocutory appeal, the court of appeals rejected the contention that an invocation of "executive privilege" precluded an *in camera* screening of the documents by the district court. — F.2d, at —, slip op., at 3.

The court of appeals provided for a review and stay of its order by this Court, if the government should request it. No applications to that effect were ever made, and the time to seek certiorari has since expired.[8] The district court performed the *in camera* inspection that the government now says will "create serious problems" (Pet. 10), and released to the public portions of the documents at issue here. The documents were before the court of appeals, and before this

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[7] Of the various documents referred to by Mr. Irwin in Paragraph 5 of his affidavit (Pet. 6-8), the only three not fully reviewed *in camera* in *Nuclear Responsibility* appear to have been Items A, B and B2.

[8] That this decision not to seek review was a deliberate one is established by the statements of the Solicitor General before this Court on the oral argument of *Nuclear Responsibility*, 404 U.S. 917, *denying injunction* in — F.2d — (C.A.D.C. Nov. 3, 1971) (Nos. 71-1869 & Misc. 3717). See Transcript at 50-51.

Court, on the hearing of the *Nuclear Responsibility* plaintiffs' motion for an injunction.[9]

Even if the government's failure to seek review of the order of the court of appeals in *Nuclear Responsibility* does not bind it now, and even if the district court's *in camera* inspection of documents does not entirely moot the government's present position—points the respondents do not concede—still the question presented for review is so stale as not to merit this Court's consideration.

2. The case is not ripe for review.

The petitioners contend that the holding below, if sustained, "would create serious problems for the executive branch of the government" (Pet. 10). Those "problems" are difficult to see, in light of the considerable public disclosure that has already taken place as a result of the *Nuclear Responsibility* litigation. Moreover, it must be remembered that the court below has directed no additional disclosure, but only an *in camera* review by the trial court. If that court should order further public dissemination on the remand, the petitioners will have ample opportunity to seek review in the court of appeals and this Court.

In any event, the Court should not be asked to speculate on what the petitioners' "problems" are, or how serious they would be, until the courts below have had opportunity to deal with them. An *in camera* inspection by the district court may result in the conclusion that no materials besides those already disclosed in *Nuclear Responsibility* may be made public. The dis-

[9] See Transcript, *supra* n. 8, at 15-16, 26.

trict court may arrive at that conclusion, either on the basis of an examination of the documents themselves, or on the basis of his examination assisted *ex parte* by a government representative.[10]

On the other hand, the court may determine that whole sections of documents before it consist of materials to which the public is entitled, and that clearly labelled and defined documents or sections of documents may be revealed. That is just what happened to several of the documents here following the *in camera* inspection in *Nuclear Responsibility.*

3. A remand to the trial court is necessary in any event.

The Court of Appeals held that documents attached to a classified file, but not independently classified, do not come within the exemption for secret material. The petitioners acquiesce in that holding (Pet. 9, n. 4). Since the district court failed to make any findings on the issue, a remand to that court is necessary to carry out the court of appeals ruling.[11]

Moreover, although the court of appeals did not pass upon the question, the district court erred in dismissing

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[10] The latter course was suggested by the court of appeals in *Nuclear Responsibility,* and evidently was followed by the district judge on the remand that resulted in the release of the documents. See *Nuclear Responsibility, supra,* slip op. at 11, n. 12. The respondents do not concede the propriety of this procedure.

[11] Conceivably a remand might be avoided if the petitioners prevail upon their argument that the fifth exemption precludes disclosure of any of the documents. But, as is shown *infra* at 16-19, the petitioners cannot prevail on that score—if for no other reason than that the same district judge, in reviewing most of the documents at issue here, has already determined that the policies reflected in the fifth exemption do not bar public disclosure of portions of the disputed documents, and has made those portions public.

the respondents' complaint insofar as they sought to maintain the action in their official capacities as Members of Congress. The trial court acted on the theory that the doctrine of "separation of powers" precludes Members of Congress from resorting to the federal courts in controversies with the executive branch of the government. Because this ruling was clearly incorrect,[12] the court of appeals' reversal of the district court's judgment and remand of the matter for further proceedings must be affirmed even if the petitioners prevail upon the arguments they now advance. If certiorari is granted, the respondents will brief and argue the "separation of powers" issue in support of the judgment below.[13]

II. THE DECISION OF THE COURT OF APPEALS IS CORRECT

The decision below correctly follows the language, the legislative history, and prior judicial interpretations of the Freedom of Information Act. The court below has properly remanded the matter to the trial court for further proceedings.

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[12] *Cf., e.g., Powell* v. *McCormack,* 395 U.S. 486; *Baker* v. *Carr,* 369 U.S. 186, 217; see *Udall* v. *FPC,* 387 U.S. 428; *Secretary of Agriculture* v. *United States,* 347 U.S. 645; *United States ex rel. Chapman* v. *FPC,* 345 U.S. 153; *Moss* v. *C.A.B.,* 430 F.2d 891 (C.A.D.C.)

[13] In the event certiorari is granted, the respondents will also brief and argue the statutory question whether the Freedom of Information Act renders inapplicable to these respondents the exemptive provisions relied upon by the petitioners. Subsection c provides pertinently: "This Section [552] is not authority to withhold information from Congress." Since subsection b is part of the section, the quoted language removes the exemptions in any Freedom of Information Act suit brought by Members of Congress. For respondents' right to present these issues, see R. Stern & E. Gressman, Supreme Court Practice 314-15 (4th ed. 1969), and cases there cited.

1. The Freedom of Information Act requires disclosure.

The petitioners acknowledge that the Freedom of Information Act "generally makes government records available for public inspection" (Pet. 9). The statute was enacted in 1966 to replace the prior law, under which agency and department heads enjoyed a "sort of personal ownership of news about their units. . . ." H.R. Rep. No. 1497, 89th Cong. 2d Sess. 2 (1966). As Judge Friendly has said, the Congressional purpose in passing the Act was to "increase significantly the public availability of agency records." *LaMorte* v. *Mansfield,* 438 F.2d 448, 451 (C.A. 2).

The Act accomplishes its purpose by providing that in any action commenced against an agency to compel the disclosure of records, the district court "shall determine the matter de novo and the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(3). The Act thus "rejects the usual principle of deference to administrative determinations by requiring a trial 'de novo' in the district court," *Soucie* v. *David,* 448 F.2d 1067, 1077 (C.A.D.C.), and by "shift[ing] the burden of proof to the defendant." *Consumers Union* v. *Veterans Administration,* 301 F. Supp. 796, 806 (S.D.N.Y.), *appeal dismissed as moot,* 436 F.2d 1363 (C.A. 2).

The procedure of de novo judicial review, with the burden of proof on the agency, applies as well to any claim by the agency that the documents sought to be disclosed come within one of the statutory exemptions in the Act. *Epstein* v. *Resor,* 421 F.2d 930, 933 (C.A. 9), *cert. denied,* 398 U.S. 965. The Act permits the withholding of information only as "specifically stated" in the exemptions. Section 552(c). In keep-

ing with the express language of the Act and its legislative intent, the exemptions are to be narrowly construed. *Wellford* v. *Hardin,* 444 F.2d 21, 25 (C.A. 4).

2. The first exemption does not immunize entire documents simply because they are labelled "secret."

The petitioners urge that the documents here in dispute come within the first exemption, for matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," 5 U.S.C. § 552(b)(1). They argue that the documents have all been labelled secret under the general classification scheme promulgated in Executive Order 10501 some 19 years ago.

The Freedom of Information Act makes no reference to Executive Order 10501. Neither does the Senate Report that accompanied the bill. The only pertinent document mentioning Executive Order 10501—and the sole legislative evidence offered by the petitioners—is the accompanying House Report. That report did not adopt the suggestion imputed to it by the petitioners—that classification under Executive Order 10501 would, without more, entitle the agency to withhold records under the new law. Rather, the Committee said:

> "[C]itizens both in and out of Government can agree to restrictions on categories of information which *the President has determined must be kept secret* to protect the national defense or to advance foreign policy, *such as* matters classified pursuant to Executive Order 10501". H. Rep. No. 1497, *supra,* at 9-10 (footnote omitted) (emphasis supplied).

The House Report's reference to Executive Order 10501 merely suggests the sorts of material that *the President,* under the new law, may properly determine to keep secret. The petitioners do not contend that the President has ever determined that any of the information sought by the respondents, or even the category of that information taken as a whole, "must be kept secret. . . ." Rather, the petitioners rely upon the fact that some officer of government, not known to the respondents and perhaps not known even to the President, has made this determination.

The petitioners also rely upon the decision of the Ninth Circuit in *Epstein* v. *Resor, supra.* But far from supporting the petitioners, *Resor* confirms the interpretation of the Act advanced by the court below. In *Epstein,* the Army had directed a complete re-examination of a file sought by the plaintiff. That examination was in progress, and was proceeding on a paper-by-paper basis; and it followed upon a recent previous review in which the file had already once been scrutinized in its entirety. 421 F.2d at 932. The court of appeals noted:

> "The executive determination of top secret classification does not rest on an ancient order unrelated to the conditions of today. The classification has been updated and the process of current review is continuing. Nor is the agency hiding material under a filing system that gives top-secret classification to material simply because it relates, for filing purposes, to other material that is truly top secret. A paper-by-paper review was in operation in May, 1968. Nor do we find a foot-dragging passing of responsibility for ordering declassification to other departments or nations." *Id.* at 933.

Here such detailed paper-by-paper examination is not in progress, and no such review has been conducted in the past.

Indeed, the *Resor* case stands for just the proposition that the petitioners contend no court other than the one below has advanced—that the federal judiciary may determine in a Freedom of Information Act suit whether various portions of classified documents should be released (Pet. 15). The district court in *Resor* said:

> "[I]t is equally without merit to say that Congress intended absolutely no effect by the Act on information that falls within the areas covered by the exemptions. The district courts at least have jurisdiction to determine whether the exemption applies in a given situation. In furtherance of this jurisdiction, it is reasonable to say that Congress intended the courts to determine whether classification within the first exemption is clearly arbitrary and unsupportable. Otherwise, the agencies could easily frustrate the purpose of full disclosure intended by Congress merely by labeling the information to fall within the exemption." 296 F. Supp. at 217.

The court of appeals expressly affirmed this holding, stating: "The District Court ruled that under (b)(1) it had authority to determine whether classification was arbitrary or capricious." 421 F.2d at 933.

The petitioners' interpretation of the first exemption is especially startling in light of their acceptance of the holding of the court below that documents attached to a classified file but not independently classified do not come within the first exemption (Pet. 9, n. 4). The rule of "derivative classification," which the petitioners now recognize to be inconsistent with the Congressional policy of disclosure mandated by the Act, is as

much a part of Executive Order 10501 as the rule imposing a single classification on a given document (see Pet. 4). There is no textual basis, in either the statute or the executive order, for the distinction the petitioners attempt to draw.

Nor is there a basis in policy for that distinction. A single document may be as easily severable into secret and non-secret components as two documents stapled to one another. The trial judge made just that determination when he ordered the release in *Nuclear Responsibility* of significant portions of several documents bearing an over-all secret classification.

3. The fifth exemption does not immunize entire documents simply because they are called "advisory."

The petitioners also contend that the documents at issue are entirely exempt by virtue of the fifth exemption, which immunizes "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," 5 U.S.C. § 552(b)(5). The petitioners argue that the literal language of the statute nowhere distinguishes between factual information and recommendations or opinions—the distinction drawn by the court below. Further, the petitioners say, the legislative history establishes that Congress rejected an attempt to draw such a line.

The petitioners err. The language of the exemption directly incorporates the fact-opinion distinction. It does so by limiting the statutory immunity to materials "not available by law to a party other than an agency in litigation with the agency" resisting disclosure. The House Report interpreted this language to mean that "internal memorandums which would routinely be dis-

closed to a private party through the discovery process in litigation with the agency would be available to the general public." H. Rep. No. 1497, *supra*, at 10. Every court that has so far construed the provision agrees that the issue posed by the pertinent language is whether a private party would be entitled to the disputed materials in the course of pretrial discovery in a federal proceeding. *Sterling Drug, Inc.* v. *FTC*, 450 F.2d 698, 705 (C.A.D.C.); *General Services Administration* v. *Benson*, 415 F.2d 878, 880 (C.A. 9); *Consumers Union, supra*, 301 F. Supp., at 804. "The fulcrum of this test is discovery practices as regulated by the courts." *Consumers Union, supra.*

Discovery practice under the Federal Rules of Civil Procedure has generated many decisions separating agency fact from opinion. Those decisions, now codified by the fifth exemption, uniformly recognize the "obvious distinction, in terms of necessity of inspection, between documents ['composed wholly of opinions, recommendations and deliberations'] . . . and those which contain facts." *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 327 (D.D.C.), *aff'd on opinion below*, 384 F.2d 979 (C.A.D.C.), *cert. denied*, 389 U.S. 952.[14]

The legislative history establishes that the fact-opinion distinction comports with the congressional intent. The accompanying House and Senate reports show that Congress contemplated an exemption carefully tailored to protect agency opinions and recommendations—in

[14] *Accord: Machin* v. *Zuckert*, 316 F.2d 336 (C.A.D.C.), *cert. denied*, 375 U.S. 896; *Boeing Airplane Co.* v. *Coggeshall*, 280 F.2d 654, 662 (C.A.D.C.); *Reliable Transf. Co.* v. *United States*, 53 F.R.D. 24, 25 (E.D.N.Y.); see also 4 J. Moore's Federal Practice ¶26.61[7], at 26-331 (2d ed. 1971).

the words of the House report, "advice from staff assistants and the exchange of ideas among agency personnel," H. R. Rep. No. 1497, *supra,* and in the words of the Senate report, "frank discussion of legal or policy matters in writing," S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965).[15]

The petitioners argue that "the distinction . . . between factual matters and matters related to the 'policy-making process,' is highly unrealistic, for the selection and presentation of factual background bearing on a particular decision is virtually certain to be 'inextricably bound' with the decision-making process" (Pet. 17). That contention ignores the holding of the court below—that facts are exempt from disclosure wherever they are "inextricably intertwined" with the policy-making process. The contention also ignores the realities of this case—that the district judge who has al-

[15] The petitioners contend that the final language of the fifth exemption reflects a Congressional rejection of the fact-opinion distinction. But the legislative history demonstrates the contrary—it supports the distinction between documents that are "part of the deliberate process of the agency" and those that are "factual in substance." *Consumers Union, supra,* 301 F. Supp., at 805. The language "which would not be available by law to a party other than an agency in litigation with the agency" was substituted on the recommendation of the Senate Judiciary Committee for the earlier phrase, "dealing solely with matters of law or policy." S.Rep. No. 813, *supra,* at 1-2. In explaining the old language, the Committee had said in the earlier report: "All *factual* material in Government records is to be made available to the public . . . ." S.Rep. No. 1219, 88th Cong., 2d Sess. 7 (1964). "The substituted language, being more precise, seems to be a refinement of the policy versus fact distinction so that the distinction can still be used within the discovery test now explicitly laid down by the statute. It is at least clear, in light of the strong Congressional drive to promote disclosure, that the amendment was not intended to place 'factual material' within the coverage of the fifth exemption." *Consumers Union, supra.*

ready examined the documents has made just the distinction between fact and opinion that the petitioners say cannot be done.[16]

4. *In camera* inspection is an established and proper means for judicial administration of the Act.

The petitioners assert that the materials in dispute are entirely exempt under the statute, both because they have been classified "pursuant to Executive Order 10501" (Pet. 11) and because they are "entirely advisory in nature" (*id.* 18 n. 11). No court has ever made either determination on the basis of an examination of the documents. To the contrary, to the extent that the courts have looked at the documents—and the judges of three courts, including this one, have presumably done so—they have made the opposite determination. District Judge Hart, in an action left undisturbed both by the court below and by this Court, directed the release of significant portions of the documents. Presumably he would not have done so if he had believed that those portions disclosed either secrets classified "pursuant" to an executive order, or agency opinion entitled to be held in confidence. Presumably, he concluded that those portions consisted of facts—information the public is entitled to have.

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[16] In an affidavit filed in the *Nuclear Responsibility* case, the petitioner Train asserted, with respect both to the memorandum of the Council on Environmental Quality that is Item 5B5 in the Irwin affidavit (Pet. 7), and to other papers:

> "I have determined that it would be injurious to the proper performance of the Council's statutory responsibilities to the President to disclose the documents or their contents. . . ."

The portions of that memorandum, released by the District Court and reprinted as an appendix to this brief in opposition, reveal the solely factual nature of the material disclosed.

The government has not objected to *in camera* inspections of "secret" materials by trial and appellate courts and by this Court—in cases where *it* has applied for judicial review. See, *e.g., New York Times Co.* v. *United States,* 403 U.S. 713, *aff'g United States* v. *Washington Post Co.,* 446 F.2d 1327, 1328 (C.A.D.C.) and *rev'g United States* v. *New York Times Co.,* 444 F.2d 544 (C.A. 2), *rev'g* 328 F. Supp. 324, 326 (S.D. N.Y.). On the contrary, the Solicitor General urged this Court not long ago to resolve conflicts between the litigant's right to information and the government's need for secrecy by subjecting disputed materials to *in camera* inspection:

> "It is also familiar doctrine that when there is some recognized interest militating against unnecessary public disclosure of information which a litigant is seeking to discover, it is appropriate to submit the material to the district judge for *in camera* examination so that he may determine whether disclosure should be ordered." [17]

This Court has repeatedly provided for *in camera* inspection of documents over which the government and private litigants have conflicting claims. *See Taglianetti* v. *United States,* 394 U.S. 316 (electronic surveillance); *Dennis* v. *United States,* 384 U.S. 855, 874-75 (grand jury testimony); *Campbell* v. *United States,* 365 U.S. 85, 95 (Jencks Act statements); *Palermo* v. *United States,* 360 U.S. 343, 354 (Jencks Act statements); see also *United States* v. *Reynolds,* 345 U.S. 1, 10.

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[17] *Kolod* v. *United States,* 390 U.S. 136, Memorandum of the United States on Motion to Amend Order of Jan. 28, 1968, at 8, *modified sub nom. Alderman* v. *United States,* 394 U.S. 165.

The petitioners' assertion that the documents all fall within each of the two exemptions amounts to a thinly-disguised rejection of any role for the federal judiciary in the administration of the Freedom of Information Act, and a virtual emasculation of the Act itself. Their position amounts to the contention that de novo judicial review, with the burden of proof on the agency—as mandated by the Act—has no meaning; that judicial inquiry is to be foreclosed by the *ex parte* assertion of executive officers that their records are immune to disclosure.

CONCLUSION

For the foregoing reasons, the respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: February 14, 1972
Washington, D. C.

APPENDIX

December 2, 1970

MEMORANDUM FOR THE HONORABLE JOHN N. IRWIN II

SUBJECT: Potential Environmental Hazards Associated with CANNIKIN

[Deletion]

Earthquake Generation. The mechanism of an earthquake is still a matter of some speculation. In brief, the earth's crust is thought to be made up of numbers of rigid blocks generally of continental dimensions bounded by regions in which seismic activity is high. The blocks move relative to each other, but the cause of the motion is unknown. The scraping of one block against another leads to a concentration of energy in the form of elastic strain energy. The regions between blocks are characterized by fault or tears in the crust. An earthquake occurs when the strains in the crust build up to such an extent that the frictional forces along the faults are overcome. A large amount of strain energy is released and this produces the damage, though probably only a small fraction of the stored energy is tapped even in the great earthquakes.

Recent studies of both the Chilean earthquake of 1960 and the Alaskan earthquake of 1964 suggest that great earthquakes consist of a superposition of smaller quakes. The smaller quakes trigger each other like a line of falling dominoes, the combined effect being that of a great earthquake. The individual earthquakes making up a large earthquake have a magnitude of six to seven on a logarithmic scale. In the great earthquakes, having a magnitude intensity of eight, motion along the fault extends as far as a thousand kilometers. The energy released in the largest earthquakes is equivalent to several hundred megatons while the energy released in the postulated smaller component earthquakes is on the order of one to ten megatons.

Because of the vast energies involved in earthquakes, it had been thought until recently that man could not artificially produce an earthquake. Now there are three well-documented ways in which man is known to have triggered earthquakes.

A series of earthquakes were observed near Denver in a region that had previously been aseismic. The best interpretation of this phenomena is that waste fluids from the Rocky Mountain arsenal were pumped deep into the earth and lubricated a previously existing fault. Slippage along the fault was thus possible and strain that had previously accumulated in the adjacent rock over geologic time was liberated in the form of earthquakes.

A second example is found in the case of earthquakes associated with large lakes or reservoirs. As a result of loading of the earth's crust by these large bodies of water or by the modification of the groundwater flow or for some other reason not yet understood, substantial earthquakes have been associated with construction of large artificial lakes. A recent earthquake near Koyna Dam in India located in an area that is not normally seismic killed about 200 people. Similarly, many small earthquakes occurred when Lake Mead was filled.

A third example and one most relevant to CANNIKIN is the triggering of earthquakes by motion along known faults in Nevada by large underground nuclear explosions. Fault scarps over six feet in maximum height and several miles in length have resulted from fault movements initiated by underground explosions. The evidence is strong that natural strain energy stored in the earth has been released in the Nevada test site by the underground explosions.

An underground explosion can affect the strain field within the crust in a number of ways. The large amplitude surface waves generated by the underground explosion can

dynamically overload near surface breaks or fractures within the crust and bring about a strain adjustment. The creation of a large cavity together with a later collapse of the chimney produces permanent changes in the strain field. Observations in Nevada of the BENHAM event of about a megaton produced strain changes of sufficient magnitude to trigger an earthquake along previously existing faults of a distance about 15 kilometers. However, the strain field resulting from an underground explosion cannot be calculated with any precision because of the dependence of the field on the detailed geology which is largely unknown at any given location.

In addition to the direct effects of the blast on the strain field, the explosion will alter the pressure regime in the groundwater. The water pressure in the rocks interstices will increase due to the compaction of the ground around the cavity. This over-pressure might be as large as 10 bars at a radius of 18 km. This increase in the fluid pressure will reduce the friction between fracture separated blocks. The effect would be greatest on faults oriented parallel to the residual compressive stresses resulting from the test explosion. Thus, it is possible that the mechanism involved in the Denver earthquake would raise the probability of triggering a large earthquake.

All the earthquakes triggered by underground explosions in the various Nevada tests released substantially less energy than the explosion itself. If one could establish that this is a necessary condition then there would be no apprehension with regard to the CANNIKIN event. Unfortunately, this is not the case. The magnitude of the triggered earthquakes will depend on the state of strain in the crust in the general region at which the underground explosion is set off. Extrapolation from the Nevada experience is uncertain because of the fundamentally different geologic setting between Nevada and the Aleutians. Further, experience with MILROW does not provide a

sure basis for extrapolation. In the highly nonlinear phenomena involved in earthquake generation, there may be a threshhold value of the strain that must be exceeded prior to initiation of a large earthquake. The suggested explanation of the Chilean and Alaskan earthquakes in terms of a succession of smaller earthquakes would support this interpretation. In this model a number of lock points stabilize a fault. Once one lock point is broken, sufficient energy may be released to break other lock points. If the stored strain energy is large, then the triggered earthquake could be of much greater magnitude than the triggering event. The underground explosion could serve as the first domino of the row of dominoes leading to a major earthquake. The major fault in the general region of Amchitka is thought to be some 40km. beneath the test shot. The strain field will certainly be altered at this depth by the underground explosion. Observations on the BENHAM event showed strains exceeding tidal strains at 29km.

Potential Effects of a Triggered Earthquake. The population density in the Aleutian area is very low so even a major earthquake would cause little damage and little loss of life as a result of the direct impact of the earthquake itself. This would not be true if the generated earthquake were so large as to extend towards mainland Alaska. While this is improbable since the largest known earthquakes have extended along the faults on the order of a thousand kilometers but not two thousand kilometers, there are uncertainties with regard to fault lengths associated with earthquakes.

The real danger from the triggering of a large earthquake by the nuclear explosion is in a tidal wave or tsunami. Tsunamis generated in the Eastern Aleutians by earthquakes have had damaging effects at great distance. For example, a tsunami in 1946 killed 159 people in Hawaii and was observed in Peru. The potential long-range effect emphasized by the fact that this Chilean earthquake of 1960

caused loss of life in Japan. The mechanism by which a tsunami is generated is still uncertain; tsunamis are probably due to movements of the sea floor associated with fault motion. Large earthquakes in the near vicinity of Amchitka have not caused destructive tsunamis in the past. However, as in the case of earthquakes it is not possible at this time to assess quantitatively the probability of a tsunami following the explosion.

Effects of Explosion on Groundwater Movement. The explosion resulting in a cavity followed by a collapse of the overlying rock forming a rubble chimney will affect the groundwater flow in several ways. The initial shock wave and accompanying water overpressure may open up new fractures which could alter rates of flow.

The formation of the chimney will probably lead to a saucer-like depression even though the true rubble chimney does not extend to the surface. Since the groundwater level almost reaches the surface the depression will fill with water.

The chimney itself will be relatively permeable to water movement and there will be a tendency for the warm water near the cavity to move upward through the rubble. In this way radioactive nuclides, principally tritium, can be mixed throughout the chimney. The time scale for such mixing is not known but could be as short as a few years or less.

Water in the chimney would move to the sea at a rate dependent on the hydraulic head, the permeability of existing aquifers and permeability of any new fractures opened up by the explosion. USGS calculations indicate a time for such movement might be as short as one to two years. These are short times and are inconsistent with estimates made by AEC that tritium will be discharged into the ocean only 145 years after the explosion. At that time the concentration of tritium in the groundwater is expected to be at a level close to the maximum permissible concentration

for water. If the shorter times (5 to 10 years) postulated above are correct then the level of radioactivity in the groundwater entering the ocean would be in excess of ten thousand to one hundred thousand maximum permissible concentration for water.

Effects of Groundwater Release of Radioactivity into the Ocean. The waters adjacent to Amchitka hold rich fisheries. Pacific salmon that migrate through the area are important commercially. Japanese, Soviet and American fishermen take salmon, ocean perch and limited amounts of king crab.

The tritium released through groundwater motion will be diluted by the ocean currents. Even if the dilution is as great as a hundred thousand, there is the possibility of concentration of tritium well above background levels in various steps of the food chain. The detailed behavior of tritium in the food chain is uncertain though it is not generally thought to be concentrated. However, the possibility remains of fish being caught having higher than the backgrounds of radioactivity.

[Deletion]

RUSSELL E. TRAIN
Chairman

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-909

ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

PATSY T. MINK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported. The district court rendered no opinion.

JURISDICTION

The judgment of the court of appeals was entered on October 15, 1971 (Pet. App. B). The petition for a

writ of certiorari was filed on January 13, 1972, and was granted on March 6, 1972 (App. 64). The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the district court may make an *in camera* inspection of secret and top secret documents exempt from disclosure under 5 U.S.C. 552(b)(1) ("required by Executive order to be kept secret in the interest of the national defense or foreign policy") for the purpose of releasing portions of such documents which it may find to be "non-secret components."

2. Whether the district court may review *in camera* documents exempt from disclosure under 5 U.S.C. 552(b)(5) (inter-agency memoranda), for the purpose of selecting and making available to the public portions of such memoranda which the court determines are "factual" and not "inextricably intertwined with policymaking processes."

STATUTE AND EXECUTIVE ORDERS INVOLVED

The Freedom of Information Act, 5 U.S.C. 552, and pertinent portions of Executive Order 10501, as amended, 3 C.F.R. 292 (Jan 1, 1971), are reproduced in the appendix, *infra*, pp. .

STATEMENT

Respondents, 33 members of Congress, instituted this action in the district court in August 1971 pur-

suant to the Freedom of Information Act, 5 U.S.C. 552, to compel the release to them of documents prepared for the President in connection with the underground nuclear test scheduled for Amchitka Island, Alaska [1] (App. 3-13).

The government moved to dismiss the action, or in the alternative for summary judgment, on the ground that the requested materials were specifically exempted from disclosure under exemptions 1 and 5 of that Act (5 U.S.C. 552(b)(1) and (5)) (App. 26). Exemption 1 excludes from disclosure matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." Exemption 5 excludes from disclosure "interagency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." In support of its motion the government filed an affidavit of John N. Irwin, II, the Under Secretary of State (App. 27-32). The affidavit states that in January 1969, the President established an "Under Secretaries Committee", of which Mr. Irwin was Chairman and which was part of the National Security Council System. The Committee, as described by the President to Con-

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[1] A separate action was brought in the district court to enjoin the test itself. *Commitee for Nuclear Responsibility, Inc.* v. *Seaborg* (D.D.C., Civil Action No. 1346-71). In that case, this Court denied an application for an injunction on November 6, 1971, *Committee for Nuclear Responsibility, Inc.* v. *Schlesinger*, 404 U.S. 917, and the Amchitka test (known as ("Cannikin") was conducted on that date.

gress, "links the process of policy formulation to the operations of the Government" (App. 27).

The affidavit then describes the assignment the President gave to the Committee regarding underground nuclear testing:

> 3. On June 27, 1969, the President directed the Under Secretaries Committee to review the annual underground nuclear test program and to encompasss within this review requests for authorization of specific scheduled tests. He directed that the Committee consider the policy and technical justification for the proposed tests to determine whether they are consistent with the requirements of national security and foreign policy. He requested that the results of the Committee's review of the underground nuclear tests programs and its recommendations be transmitted to him in time to allow him to give them full consideration before the scheduled events. [App. 27-28.]

Pursuant to that presidential direction, the Under Secretaries Committee prepared a report for the President on the underground test "Cannikin." Paragraph 5 of the affidavit listed and described the documents in the report:

> In accordance with the foregoing directions from the President, the Under Secretaries Committee has prepared a report upon the proposed underground nuclear test known as Cannikin consisting of the following:
>
> A. A memorandum prepared by me to the President dated July 17, 1971. This memoran-

dum is classified as Top Secret and as Restricted Data.

B. Attached to that memorandum to the President was a report of the Under Secretaries Committee on the proposed Cannikin test. This report is classified Top Secret and as Restricted Data. The following documents were attached to this report:

1. A letter from the Chairman of the Atomic Energy Commission to the Chairman of the Under Secretaries Committee, myself. This letter is separately classified Secret and separately as Restricted Data.[2]

2. A report of the Defense Program Review Committee, the Chairman of which is Dr. Henry Kissinger. This report is separately classified as Top Secret and separately as Restricted Data.

3. The Environmental Statement Cannikin, dated June 1971, by the United States Atomic Energy Commission. This document is publicly available and a copy is attached as Exhibit C.

4. A transcript of a briefing by the Atomic Energy Commission on Cannikin given orally to the Under Secretaries Committee. This document is separately classified as Secret and separately as Restricted Data;[3] and

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[2] Parts of this letter were ordered disclosed to the plaintiffs in the discovery proceedings in the action brought to enjoin the test. The *Committee for Nuclear Responsibility* v. *Seaborg*, (D.D.C. Civil Action No. 1346-71) order of November 2, 1971. We do not seek relief with respect to the materials disclosed in that litigation (See also nn. 3, 4).

[3] Parts of this transcript were also ordered disclosed to the plaintiffs in the *Nuclear Responsibility* discovery order of November 2, 1971, n. 2, *supra*.

5. A memorandum to me from the Council on Environmental Quality. This memorandum is an attachment to the classified report and is separately unclassified.[4]

C. In addition, letters containing recommendations were transmitted to me regarding the proposed test known as Cannikin by Mr. William D. Ruckelshaus for the Environmental Protection Agency, by Mr. Russell Train, for the Council on Environmental Quality and by Dr. Edward E. David, Jr., for the Office of Science and Technology. Each of these three letters is classified Top Secret and as Restricted Data.[5]

The documents described in this paragraph, except for item B3 above, were prepared solely for the purpose of giving advice to the President and involve, except for item B5 above, highly sensitive matter that is vital to our national defense and foreign policy. They were prepared and used solely for transmittal to the President as advice and recommendations and set forth the views and opinions of the individuals and agencies preparing the documents so that the President might be fully apprised of varying view-

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[4] This memorandum, with certain deletions, was also ordered released during the discovery in the *Nuclear Responsibility* litigation. The released portions are reproduced in the appendix to the Brief for the Respondents in Opposition.

[5] The Environmental Protection Agency has advised us that Mr. Ruckelshaus' letter has been declassified. Mr. Train's letter was classified only because it was to be attached to the Undersecretary's Report. We do not rely upon Exemption 1 of the Act as a ground for nondisclosure of these documents but rely solely upon Exemption 5. See, *infra*, pp. 17, n. 12; 30-42.

points and have been used for no other purpose. [App. 28-29.]

Mr. Irwin further stated (*ibid.*) that the documents described as "Top Secret" and "Secret" had been classified pursuant to Executive Order No. 10501, and that those described as Restricted Data had been classified pursuant to the Atomic Energy Act of 1954 (42 U.S.C. 2014(Y), 2161, and 2162). He also pointed out (App. 30) that he had "sought to make publicly available as much information as possible consistent with the needs of national defense and foreign policy" and that certain information about the yield of the test had, at his request, been made public by the Defense Department (See Exhibit E to Irwin Affidavit, Record in District Court, filed with the Clerk of this Court). However, the "information in the documents described in this affidavit which is not public necessarily is held in strict confidence by the Government in order to prevent grave damage to our national defense and foreign policy interests" (App. 30).

The district court, without *in camera* inspection, held that the documents were "exempted from compelled disclosure by 5 U.S.C. 552(b)(1) and * * * 5 U.S.C. 552(b)(5)" (Pet. App. 32-33). Accordingly it granted the government's motion for summary judgment, and dismissed the action[*] (Pet. App. 33).

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[*] The district court also dismissed the action insofar as plaintiffs sought relief in their capacity as members of Congress (Pet. App. 32). Since the court of appeals did not

The court of appeals reversed and remanded the case to the district court for *in camera* inspection of the documents and a determination whether disclosure should be ordered as to some of the materials in the Report. The court ruled with respect to classified documents that a document that is separately unclassified cannot be withheld "merely because it has been incorporated into a secret file" (Pet. App. 26),[7] and that a document marked "Secret" only because it is to become part of a secret file cannot be withheld if it "would not have been independently classified as secret" (*id.*, p. 27). The court further ruled that documents classified "top secret" or "secret" pursuant to Executive Order 10501, should be reviewed to permit disclosure of any "non-secret components [which] are separable from the secret remainder and may be read separately without distortion of meaning" (Pet. App. 27). The court further held that documents which the government claimed were within the Information Act's Exemption for inter-agency or intra-agency memoranda (Exemption 5) were to be reviewed *in camera* to permit disclosure "of factual information unless it is inextricably intertwined with policymaking processes" (Pet. App. 28).

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rule on that aspect of the case, it has no direct bearing on the issues in this Court. We discuss this matter briefly at n. 8, *infra*.

[7] We do not challenge this particular ruling, but note that any such document in this case would in any event come within Exemption 5 of the Act (see *infra*, pp. 30-42).

SUMMARY OF ARGUMENT

I

The documents in this case which have been classified "Top Secret" or "Secret" pursuant to Executive Order 10501, are exempt, in their entirety, from compulsory disclosure by Exemption 1 of the Freedom of Information Act (5 U.S.C. 552(b)(1)). That exemption excepts from the disclosure requirements of the Act "matters * * * specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." The legislative history of Exemption 1 shows that it was intended to cover documents, such as those at issue in the present case, which have been so classified pursuant to Executive Order 10501. See, *e.g.*, H. Rep. No. 1497, 89th Cong., 2d Sess., pp. 9-10 (1966), and 112 Cong. Rec. 13659.

Notwithstanding the fact that these documents were classified under Executive Order 10501, and are thus exempt from compelled disclosure under the Act, the court below ordered an *in camera* inspection of the materials and the disclosure of any portions the district court might find to be "non-secret" components. That ruling improperly injects the court into a domain which has long been recognized to be within the peculiar discretion of the Executive.

Congress intended by Exemption 1 to accord broad respect for the Executive's decision as to the classification of government documents in the interest of national defense and foreign policy. The relevant de-

cisions of other courts construing the Exemption, as well as this Court's decision in *United States* v. *Reynolds*, 345 U.S. 1, confirm that the courts may not review documents such as these in order to release to the public materials the court determines to be "non-secret."

II

All of the documents at issue here also are protected in their entirety from disclosure by Exemption 5 of the Act (5 U.S.C. 552(b)(5)), which exempts "matters that are * * * inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

Exemption 5 was intended to incorporate the principle of discovery law that "intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated" are privileged against disclosure. *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C.), affirmed, 384 F. 2d 979 (C.A. D.C.), certiorari denied, 389 U.S. 952. The documents in the present case are precisely the kind of documents Exemption 5 was intended to cover, since they were prepared solely for the purpose of advising the President on a nuclear test.

The legislative history of Exemption 5 shows that Congress intentionally broadened the scope of earlier drafts of the provision to protect the confidentiality of factual material in advisory memoranda. The

court of appeals' order that these documents be reviewed *in camera* for the purpose of disclosing factual material frustrates the purpose of Exemption 5 of encouraging frank discussion of all aspects of a problem in advisory memoranda. Moreover, Exemption 5 permits compelled disclosure only of documents which would "routinely" be made available in discovery (H. Rep. No. 1497, *supra* at 10); these sensitive documents would not routinely be made available to a litigant in discovery.

ARGUMENT

Introduction

The Freedom of Information Act[8] is a revision of Section 3 (the public information section) of the Administrative Procedure Act, 5 U.S.C. 1002 (1964 ed.). The basic reason for the Freedom of Information Act was Congressional concern that "[a]lthough the theory of an informed electorate is vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for that information." S. Rep. No. 813, 89th Cong., 1st Sess., p. 3 (1965) (hereafter S. Rep. No. 813). Congress concluded that the former public information section was "full of loopholes which allow agencies to deny legitimate information to the public" (*ibid.*).

The former public information section provided for disclosure of public records "to persons properly and

[8] Originally enacted in 1966 as P.L. 89-487, 80 Stat. 250, the Act was codified in 5 U.S.C. 552 by P.L. 90-23, 81 Stat. 54.

directly concerned * * *." 5 U.S.C. 1002(c) (1964 ed). The present statute, however, directs that public information and records shall be made available "to the public" and "to any person." 5 U.S.C. 552 (a) and (c). See H. Rep. No. 1497, 89th Cong., 2d Sess., p. 1 (1966) (hereafter "H. Rep. No. 1497"). The new law recognized "the basic right of any person—not just those special classes 'properly and directly concerned'—to gain access to the records of official Government actions" (*id.*, at p. 5); and it "establishes the basic principle of a public records law by making the records available to any person" (*id.*, at p. 8). See also S. Rep. No. 813, at pp. 5-6; Davis, *Administrative Law Treatise*, 1970 Supp., § 3A.4, pp. 120-121.[9]

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[9] It follows that under the Freedom of Information Act the fact that respondents are Congressmen gives them no greater rights than "any person" or the "public." Indeed, the Act does not purport to deal with the preexisting rights of the Congress as such to obtain information from government agencies through its own processes. Thus, Subsection (c) of the Act (5 U.S.C. 552(c)), states that "[t]his section [*i.e.*, the Act itself] is not authority to withhold information from Congress." The House Report explains that "a law controlling public access to Government information has absolutely no effect upon congressional access to information. Members of the Congress have all the rights of access guaranteed to 'any person' by S. 1160, and the Congress has additional rights of access to all Government information which it deems necessary to carry out its functions." H. Rep. 1497, at 11-12. The footnote to that quoted statement refers to p. 23 of the 1965 House Hearings, where Congressman Moss stated:

[Footnote continued on page 13]

The Freedom of Information Act provides "workable standards for what records should and should not be open to public inspection," in the place of what Congress viewed as the unsatisfactorily broad generalizations contained in the old public information section. See S. Rep. No. 813, p. 5. It places heavy emphasis upon increasing the availability to the public of "agency law," *e.g.*, final opinions of agencies, orders made in the adjudication of cases, statements of policy and interpretations, and administrative staff manuals and instructions that affect a member of the public. 5 U.S.C. 552(a)(2); see S. Rep. No. 813, at pp. 6-7; H. Rep. No. 1497, at pp. 7-8.[10] It also added a specific provision, 5

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[9] [Continued]

> Mr. Moss. I would like to clarify one thing. This is not intended to affect the rights of the Congress. This is dealing with a public right, this proposed legislation.
>
> * * * *
>
> Mr. Moss. Only with a public right. And Congress can, as an equal branch, use its own rights and privileges in seeking to get its information.
>
> This proposed bill does not affect the rights of the Congress.

Hearings before a Subcommittee of the House Committee on Government Operations, "Federal Public Records Law," 89th Cong., 1st Sess. (March and April 1965), at 23. See also, *id.* at 143, 157; S. Rep. No. 813 at 10.

[10] See *American Mail Line, Ltd.* v. *Gulick*, 411 F. 2d 696 (C.A.D.C.). The new law also required agencies to make public all final votes of agency members (5 U.S.C. 552 (a) (4)); to keep a current index of their orders, opinions, etc. (5 U.S.C. 552 (a) (2) (c)); and to make public concurring and dissenting opinions (5 U.S.C. 552 (a) (2) (A)).

U.S.C. 552(a)(3), for judicial review of wrongful agency withholding of public records. S. Rep. No. 813 at p. 5-6. Such judicial review had not theretofore been available.

Although the Freedom of Information Act was designed to make available to the public considerably more information than had previously been accessable, Congress also recognized that government operations could not be conducted effectively unless the confidentiality of certain material could be maintained. Subsection (b) of the Act thus expressly exempts from disclosure nine categories of records. As the Senate Committee explained (S. Rep. No. 813, at p. 3):

> At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.
>
> It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and pro-

tects all interests, yet places emphasis on the fullest responsible disclosure.[11]

The President reiterated that the Act reflects a balancing of competing interests. On approving the Freedom of Information Act, he stated (2 Weekly Compilation of Presidential Documents 895, July 11, 1966):

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits. * * *
>
> At the same time, the welfare of the Nation or the rights of individuals may require that some documents not be made available. As long as threats to peace exist, for example, there must be military secrets. A citizen must be able in confidence to complain to his Government and to provide information, just as he is—and should be—free to confide in the press without fear of reprisal or being required to reveal or discuss his sources.
>
> Fairness to individuals also requires that information accumulated in personnel files be pro-

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[11] Similarly, the House Committee stated (H. Rep. No. 1497, at p. 6):

> It is vital to our way of life to reach a workable balance between the right of the public to know and the need of the Government to keep information in confidence to the extent necessary without permitting indiscriminate secrecy. The right of the individual to be able to find out how his Government is operating can be just as important to him as his right to privacy and his right to confide in his Government. This bill strikes a balance considering all these interests.

> tected from disclosure. Officials within Government must be able to communicate with one another fully and frankly without publicity. * * *
>
> I know that the sponsors of this bill recognize these important interests and intend to provide for both the need of the public for access to information and the need of Government to protect certain categories of information. Both are vital to the welfare of our people. Moreover, this bill in no way impairs the President's power under our Constitution to provide for confidentiality when the national interest so requires. There are some who have expressed concern that the language of this bill will be construed in such a way as to impair Government operations. I do not share this concern.

With these general considerations in mind, we now contend that the documents sought by respondents here—materials prepared solely for the purpose of advising the President on the merits of the Amchitka nuclear test—are exempt in their entirety from the Act's disclosure requirements, and that the decision below seriously misconstrues the applicable exemptions.

I

Exemption 1 of the Act Protects From Disclosure or *In Camera* Inspection the Documents Classified "Top Secret" or "Secret" Pursuant to Executive Order 10501.

Respondents, under the Freedom of Information Act, seek to obtain disclosure of documents that have been classified "Top Secret" or "Secret" pursuant to Executive Order 10501. We submit that those documents are exempt in their entirely from the Act's

disclosure requirements by virtue of Exemption 1, 5 U.S.C. 552(b)(1).[12] As a necessary corollary, the court below erred in directing *in camera* inspection of those documents for the purpose of disclosing any portions thereof.

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[12] The specific documents for which Exemption 1 is now claimed are:

1. The Top Secret memorandum prepared by Under Secretary Irwin for the President, dated July 17, 1971 (Irwin Affidavit Paragraph 5A).
2. The Top Secret Report of the Under Secretaries Committee on the Cannikin test (Irwin Affidavit Paragraph 5B).
3. The Top Secret report of Dr. Kissinger's Defense Program Review Committee (Irwin Affidavit Paragraph 5B2).
4. Those portions of the transcript (classified Secret) of the oral briefing given by AEC to the Under Secretaries Committee, which were not released in the Nuclear Responsibility case (see n. 3 *supra*) (Irwin Affidavit Paragraph 5B4).
5. The Top Secret recommendation letter of Dr. Edward E. David, Jr., Chairman, Office of Science and Technology (Irwin Affidavit Paragraph 5C).

We do not rely on Exemption 1 with respect to Mr. Ruckelhaus' letter which has now been declassified nor with respect to the letter of Mr. Train, which was classified in anticipation that it would be attached to the Under Secretaries Committee Report, both of which are listed in Paragraph 5C. See n. 5, *supra*. We do, however, contend that these letters are exempt from disclosure under Exemption 5, *infra*, pp. 30-42.

In addition, Exemption 1 is claimed for any classified matters which were excised from the material released in the *Nuclear Responsibility* case, *supra*, n. 2.

A. *The Exemption Bars Disclosure of Documents Classified as Top Secret or Secret.*

Exemption 1 exempts from the Act's disclosure requirements "matters * * * specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." The legislative history of that exemption shows that the exemption protects from disclosure governmental records, such as those sought here, which have been classified as Top Secret or Secret pursuant to the authority granted by Executive Order 10501 to classify material "in the interest of the national defense." [13]

The House Report stated with respect to the Exemption that "* * * citizens both in and out of Government can agree to restrictions on categories of information which the President has determined must be kept secret to protect the national defense or to advance foreign policy, such as matters classified pursuant to Executive Order 10501." H. Rep. No. 1497, at pp. 9-10. Similarly, Representative Gallagher, a member of the House Committee, explained the exemption as follows (112 Cong. Rec. 13659):

> There has been some speculation that in strengthening the right of access to Government

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[13] Executive Order 10501 will be superseded effective June 1, 1972, by Executive Order 11652, 37 F.R. 5209. The argument in the text respecting legislative recognition of Executive Order 10501 in Exemption 1 applies equally to that successor Order, since it will provide the analogous source of authority for the classification of government documents "in the interest of national defense or foreign relations * * *." 37 F.R. 5209.

> information, the bill, as drafted, may inadvertently permit the disclosure of certain types of information now kept secret by Executive order in the interests of national security.
>
> Such speculation is without foundation. The committee, throughout its extensive hearings on the legislation and its subsequent report, has made it crystal clear that the bill in no way affects categories of information which the President—as stated in the committee report—has determined must be classified to protect the national defense or to advance foreign policy. These areas of information most generally are classified under Executive Order No. 10501.

Representative Moss, Chairman of the House Sub-Committee which considered the bill, stated during the House Hearings that Exemption 1 "was intended to specifically recognize that Executive order [No. 10501]" and is drafted "in conformity with that Executive Order." Hearings before a Subcommittee of the House Committee on Government Operations, "Federal Public Records Law," 89th Cong., 1st Sess. (March and April 1965) (hereafter: "1965 House Hearings"), pp. 52, 105.[14]

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[14] This legislative history lays to rest any contention that Exemption 1 requires the President to issue separate orders for each document he seeks to protect from disclosure under the Act. As long as a record is classified pursuant to Executive Order 10501 (and perforce any successor order) Exemption 1 applies. The language in the Exemption that the matter be "specifically required by Executive order to be kept secret" means only that the document must come under the applicable Executive Order which "specifically requires" secrecy.

The documents involved in this case, which have been classified "Top Secret" or "Secret" pursuant to Executive Order 10501, are on their face "matters * * * specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." Executive Order 10501 establishes the categories of "Top Secret" and "Secret" as the highest classification of official information affecting the national defense (*id.*, § 1; Pet. App. 3) and requires that "[k]nowledge or possession of classified defense information shall be permitted only to persons whose official duties require such access in the interest of promoting national defense, and only if they have been determined to be trustworthy" (*id.*, § 7; App. *infra*, p. 51). Such information may only "be disseminated outside the executive branch * * * under conditions and through channels authorized by the head of the disseminating department or agency * * *" (*id.*, § 7(b); App. *infra*, p. 52). Undersecretary Irwin's affidavit states (App. 29) that these documents, which relate to a recent nuclear test, involve "highly sensitive matter that is vital to our national defense and foreign policy." The documents are thus exempt from the disclosure requirements of the Freedom of Information Act.

B. *The Courts Are Not Authorized to Declassify Those Portions of Documents Classified as Top Secret or Secret that They Conclude Are Improperly Classified.*

The court of appeals held that despite the classification of the documents as "Top Secret" or "Se-

cret" pursuant to Executive Order 10501, the district court should examine the documents *in camera* and permit disclosure of any portions which it finds are "non-secret components [which] are separable from the secret remainder and may be read separately without distortion of meaning * * *" (Pet. App. 27).

There is nothing in Exemption 1 that justifies this procedure. The statute exempts from disclosure material "required by Executive order to be kept secret in the interest of the national defense or foreign policy." Once documents have been classified as "top secret" or "secret" pursuant to that Executive order, they are protected against disclosure. As the legislative history discussed above shows, the intent of Congress in providing Exemption 1 was, in the words of Representative Gallagher, to protect the confidentiality of "areas of information * * * classified under Executive Order No. 10501" (112 Cong. Rec. 13659).

The effect of the decision of the court of appeals is to require the courts to review the classifications made by the Executive Branch of documents relating to national security and foreign affairs and to permit them to substitute their judgment with respect to the proper classification of material for that of the Executive. If the courts have this power, there is no reason why its exercise should be limited to declassifying portions of the document. The rationale of the court of appeals would also permit a court to declassify an entire document which it concludes was improperly classified.

To permit the courts to engage in this procedure would not only embark them upon a venture that they are ill-adapted to perform, but would also constitute an unfortunate and inappropriate judicial incursion into areas which, under our system of separation of powers, necessarily are committed to the Executive Branch because of their intimate relationship to national defense and foreign affairs.

1. Mr. Justice Stewart recently summarized the reasons for this conclusion in his concurring opinion in *New York Times Co.* v. *United States*, 403 U.S. 713, 727-730 (emphasis added):

> * * * [I]t is elementary that the successful conduct of international diplomacy and the maintenance of an effective national defense require both confidentiality and secrecy. * * * [W]ithin our own executive departments, the development of considered and intelligent international policies would be impossible if those charged with their formulation could not communicate with each other freely, frankly, and in confidence. In the area of basic national defense the frequent need for absolute secrecy is, of course, self-evident.
>
> I think there can be but one answer to this dilemma, if dilemma it be. *The responsibility must be where the power is.* If the Constitution gives the Executive a large degree of unshared power in the conduct of foreign affairs and the maintenance of our national defense, then under the Constitution the Executive must have the largely unshared duty to determine and preserve the degree of internal security necessary to exercise that power successfully. * * *

This Court previously had articulated and applied this principle in *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103. In holding unreviewable a Presidential decision modifying an order of the Civil Aeronautics Board awarding international air routes, even though "a literal reading of [the review statute] subjects this order to re-examination by the courts" (*id.* at 110), the Court rejected the possibility that the courts could appropriately review the Presidential action *in camera*. It stated (p. 111):

> * * * The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to be-

> long in the domain of political power not subject to judicial intrusion or inquiry.[15]

In providing Exemption 1, Congress intended that the action of the Executive Branch in classifying particular documents as "Top Secret" or "Secret" in the interest of national defense or foreign policy would be respected. See *supra* pp. 18-19. In response to criticism that the Act did not adequately protect the Executive's right to avoid disclosure of information whose confidentiality the national interest requires, Representative Moss stated during the House Hearings (1965 House Hearings at 14-15):

> We do not challenge that right to withhold for the national interest, because we specifically require it by Executive order to be kept secret in the interest of the national defense or foreign policy. Now, that is very broad. That means that any of these documents that are of sufficient significance to the security of this Nation or to the interests of this Nation as it deals with other nations can, by appropriate designation, be excluded from the provisions of this act.
>
> We recognize that there are going to be certain needs to keep some of this information locked up. And the Executive order which is applicable in this instance I believe is Executive Order 10501, where the President authorizes the departments and agencies to appropriately classify and lays out the guidelines for classifica-

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[15] See also *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 320-322; *Johnson* v. *Eisentrager*, 339 U.S. 763, 789; *Orloff* v. *Willoughby*, 345 U.S. 83; *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, 317-318.

> tion, which in my judgment are observed far more in the breach than in the performance. But, nevertheless, they are observed, and they are top secret, secret and confidential.
>
> * * * *
>
> The whole object of the Executive order is to have a category in which you can place and identify this information, so that it is secure.

See also material quoted from H. Rep. No. 1497, *supra*, p. 18.

In accordance with the Congressional purpose and the legal principles discussed above, two other courts have refused to reexamine the classifications made by the Executive Branch of documents relating to national security and foreign affairs. *Epstein* v. *Resor*, 421 F. 2d 930 (C.A. 9), certiorari denied, 398 U.S. 965; *Moss* v. *Laird* (D.D.C., Civil Action No. 1254-71, decided December 7, 1971, together with the consolidated case of *Fisher* v. *Department of Defense* (No. 1865-71).

In *Epstein* the plaintiff sought an Army File classified "Top Secret" pursuant to Executive Order 10501. The file had been compiled some twenty years earlier and dealt with forcible repatriation of Soviet citizens after World War II. The court of appeals held that Exemption 1 protected the material from disclosure and refused to order *in camera* inspection. It stated (421 F. 2d at 933):

> * * * The function of determining whether secrecy is required in the national interest is expressly assigned to the executive. The judi-

> cial inquiry is limited to the question whether an appropriate executive order has been made as to the material in question.
>
> This is not inconsistent with the legislative purpose. It simply recognizes the proposition that the question of what is desirable in the interest of national defense and foreign policy is not the sort of question that courts are designed to deal with. As has been stated, the judiciary has neither the "aptitude, facilities, nor responsibility" to review these essentially political decisions. Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 111, 68 S. Ct. 431, 92 L. Ed. 568 (1948); *see also* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320-322, 57 S. Ct. 216, 81 L. Ed. 255 (1936).

Similarly, in *Moss*, the plaintiffs (two of whom were Congressmen) sought disclosure under the Act of portions of the "Pentagon Papers" that had been classified pursuant to Executive Order 10501 but had not been part of those materials made public in the *New York Times* litigation (*supra*, p. 22). The district court (per Judge Gesell) held that Exemption 1 protected these documents against disclosure and also refused to inspect them *in camera*. It stated (slip op. 3-4):

> * * * The determination of the interests of national defense or foreign policy cannot be made by applying some simple litmus test to a document presented, particularly in a case such as this where good faith is not in issue. The Court, with no experience or background in such mat-

> ters, would require detailed *ex parte* background briefing even to make a tentative judgment and thus the litigation would proceed in secret with those seeking the data wholly excluded.
>
> The Freedom of Information Act was not designed to open all Government files indiscriminately to public inspection. Obviously documents involving such matters as military plans and foreign negotiations are peculiary the type of documents entitled to confidentiality. The orderly processes of government and indeed the stability of the country itself so require. Congress recognized this in the Act and the Constitution has no requirement to the contrary * * *.

United States v. *Reynolds*, 345 U.S. 1, further supports the government's interpretation of Exemption 1. In *Reynolds*, the plaintiffs sought discovery, in a Tort Claims Act suit, of a secret Air Force report made in an investigation of the crash of the airplane in which their decendents had been killed. The airplane had been testing secret electronic equipment. The government declined to produce the report, asserting the privilege against revealing military secrets. The Court stated (p. 9) that, in passing upon a claim of this privilege, if the court is "satisfied from all the evidence and circumstances '* * * that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result' * * * the claim of the privilege will be accepted without requiring further disclosure" to permit examination of the material by the trial court. The Court ruled

(p. 10) that "there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission," and that where "there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged * * * the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers".

In light of the policy expressed by Congress in Exemption 1 of the Freedom of Information Act, we submit that documents relating to atomic testing that the Executive has classified Top Secret or Secret should not be examined by a court to determine whether portions thereof should nevertheless be disclosed. See *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 325, 326, 331-332 (D.D.C.), affirmed, 384 F. 2d 379 (C.A. D.C.), certiorari denied, 389 U.S. 952; *Kaiser Aluminum Corp.* v. *United States*, 157 F. Supp. 939, 947, 948 (Ct. Cls.).

2. Courts are not well-equipped to make the decisions that the court of appeals has required the district court to make in this case. Whether a document requires a top secret or secret classification and whether that classification can safely be removed or changed, cannot be decided on the basis of simply reading the documents. Material that on its face seems relatively innocuous may, to one more familiar with the intricacy and subtlety of what is involved,

have an entirely different significance. See *supra*, pp. 26-27.

These considerations are equally, if not more, pertinent when the problem is declassifying portions of documents. Just as the significance of the entire document may depend upon extraneous factors, so the significance of the particular portion frequently can be undertsood only in the context of the entire situation. There may be many portions of documents which, standing alone, appear quite insignificant to the untrained observer, but whose disclosure would actually pose serious adverse consequences for national defense or foreign policy. The decision whether particular portions of top secret and secret documents can safely be made public requires the kind of expert knowledge and judgment that the courts simply do not possess.

The court of appeals relied on Section 3(c) of Executive Order No. 10501, which provides that a document shall be classified at the level of its highest component parts, and shall bear only a single classification even though portions thereof have different classifications (Pet. App. 27). This provision, however, is a mere housekeeping directive to government officials, designed to inform them that if a single document bears multiple classifications, the document as a whole must be classified and handled according to its highest classification. It does not undermine the argument we have made that Exemption 1 protects the confidentiality in their entirety of documents that the Executive has classified as "top secret" or "secret" pursuant to that Order.

The court of appeals did not announce any standards that the district court should follow in deciding whether to declassify portions of the documents. Apparently, it intended the district court to make its own independent judgment on whether it would be consistent with the interests of national defense or foreign policy if portions of particular documents were made public. This is not the kind of judgment the courts are well qualified to make, or should undertake to make. Congress did not intend the courts to make this judgment when it provided an exemption for disclosure of matters "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy."

II

Exemption 5 of the Freedom of Information Act Covers Factual as Well as Policy Statements in Inter or Intra-Agency Memoranda

Exemption 5 of the Act exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency". This Exemption protects internal governmental documents that would not "routinely be disclosed to a private party through the discovery process in litigation with the agency" (H. Rep. No. 1497, at p. 10). See also "Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act" (1967) at 35. Exemption 5 thus incorporates the well-established principle that discov-

ery cannot be had of "intra-governmental documents reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C.), affirmed, 384 F.2d 979 (C.A. D.C.), certiorari denied, 389 U.S. 952; *Ackerly* v. *Ley*, 420 F. 2d 1336, 1341 (C.A. D.C.).

The Exemption is based upon "two important policy considerations * * *: encouraging full and candid intra-agency discussion, and shielding from disclosure the mental processes of executive and administrative officers." *International Paper Co.* v. *Federal Power Commission*, 438 F. 2d 1349, 1358-1359 (C.A. 2), certiorari denied, 404 U.S. 827; *K.C.Wu* v. *National Endownment for Humanities*, C.A. 5, No. 71-2852, decided May 2, 1972. See also H. Rep. No. 1497 at 10; S. Rep. No. 813 at 9.

Exemption 5 exempts from disclosure all of the documents now involved in this litigation. As the affidavit of Under Secretary Irwin states, those documents were "prepared and used solely for transmittal to the President as advice and recommendations and set forth the views and opinions of the individuals and agencies preparing the documents so that the President might be fully apprised of varying viewpoints and have been used for no other purpose" (App. p. 29). They are precisely the kind of internal advisory memoranda that Exemption 5 was intended to protect from public disclosure.

The court of appeals held, however, that the district court should make an *in camera* inspection of the documents in order to make public any "factual data that can be disclosed without impinging on the policymaking decisional processes intended to be protected by this exemption" (Pet. App. 29); it stated that "while the exemption protects the decisional processes of the President, or other policy-making officials, it does not prevent the disclosure of factual information unless it is inextricably intertwined with policymaking processes" (*id.* at 28, footnote omitted). The language of the Exemption contains no exception, however, for factual material contained in the protected memoranda, and the legislative history shows that Congress intended the Exemption to cover documents containing factual as well as policy statements.

A. *The Legislative History Shows That Congress Intended Exemption 5 to Protect Against Disclosure of Inter or Intra-Agency Memoranda Containing Factual Statements.*

The genesis of Exemption 5 is found in Section 3 (c) of S. 1666, 88th Cong., 2d Sess. (1964), which exempted (110 Cong. Rec. 17086):

> the internal memorandums of the members and employees of an agency relating to the consideration and disposition of adjudicatory and rule-making matters.

At the Senate hearings on this and a related bill, a number of government officials urged that a broader

exemption covering material dealing with policy matters and not limited to adjudication or rule-making was needed.[16] The bill the Senate Committee reported contained a broader exemption. Section 3(c)(5) of the bill exempted (*ibid.*):

> intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy.

The Committee Report stated, however (S. Rep. No. 1219, 88th Cong. 2d Sess. (1964) at 7):

> All *factual* material in Government records is to be made available to the public, as well as *final* agency determinations on legal and policy matters which affect the public. [Emphasis in original.]

On the Senate floor, Senator Humphrey suggested that the section be amended to exempt "matters of fact" in internal memoranda. He argued (110 Cong. Rec. 17667):

> As presently written clause (5) of the amended Section 3(c) appears not to exempt intra-agency or interagency memorandums or letters dealing with matters of fact. For example, clause (5) would apparently not exempt memorandums prepared by agency employees for themselves or their superiors purporting to give their evaluation of the credibility of evidence obtained from witnesses or other sources. The knowledge

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[16] Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, on S. 1666 and S. 1663, 88th Cong., 1st Sess. (Oct., 1963), *e.g.*, pp. 202-203, 247.

that their views might be made public information would interfere with the freedom of judgment of agency employees and color their views accordingly. Memorandums summarizing facts used as a basis for recommendations for agency action would likewise appear to be excluded from the exemption contained in clause (5).

The Senate passed the bill without making the change Senator Humphrey suggested (110 Cong. Rec. 17668), but the House did not act upon the legislation during the 88th Congress.

When S. 1160, the bill which ultimately became the Freedom of Information Act, was introduced in the 89th Congress, it contained the same Exemption 5 as the Senate had passed in the 88th Congress. Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, on S. 1160, S. 1336, S. 1758 and S. 1879, May 1965, 89th Cong. 1st Sess. (hereafter: "1965 Senate Hearings") at 7. During the Senate hearings on S. 1160 and similar bills, government officials and agencies again expressed concern that the exemption was not broad enough, *i.e.*, that the words "dealing solely with matters of law or policy" would not cover a memorandum containing both facts and opinions. *E.g.*, 1965 Senate Hearings, pp. 36, 94-95, 112-113, 205, 236-237, 244, 366-367, 383, 402-403, 406-407, 417, 437, 445-446, 450, 490.[17] In re-

[17] Among these statements were:

Commissioner Walrath of the Interstate Commerce Commission (pp. 236-237):

[Footnote continued on page 35]

sponse to these suggestions the Senate Committee further broadened Exemption 5 to cover:

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[17] [Continued]

> * * * Almost every internal memorandum that I might send to Commissioner Goff or he to me or staff to us in the course of a decisional process will necessarily not only deal with law and policy, usually, but it will necessarily deal with facts in issue. If those memorandums were to be considered not within the exemption and therefore available to the public, the result would be harmful to us. It would stifle the free interchange of views between us in the decisional process, which exchanges even courts have recognized are not for public consumption.

Department of Commerce, pp. 406-407 (emphasis in the original):

> Subsection (e)(5) exempts "interagency or intra-agency memorandums or letters dealing *solely* with matters or law or policy." Under this provision internal memorandums dealing with *mixed questions of fact, law and policy* could well become public information. We believe this subsection should be amended to exempt also such portions of interagency or intraagency memorandums or letters as deal with matters of law or policy. We believe that the provision as presently written would unduly inhibit agency personnel from freely expressing themselves, and consequently would result in decreased agency efficiency.

Federal Aviation Administration, p. 446:

> * * * Few records would be entirely devoid of factual data, thus leaving papers on law and policy relatively unprotected. Staff working papers and reports prepared for use within the agency or the executive branch would not be protected by the proposed exemptions. This would create problems in obtaining candid reports at various levels in an organization or in the Government, and would be deterimental to efficient staff operations.

> inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency.[18]

S. Rep. No. 813 at 1. The Senate Committee explained (S. Rep. No. 813, pp. 2, 9):

> The purpose of clause (5) is to protect from disclosure only those agency memorandums and letters which would not be subject to discovery by a private party in litigation with the agency.
>
> * * * * *
>
> It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation.

Shortly before the Senate hearings, a House subcommittee began hearings on similar legislation. Like the unamended version of S. 1160, Exemption 5 in the bills before the House subcommittee covered only

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[18] As enacted by P.L. 89-487, 80 Stat. 250, S. 1160 also defined "private party" as "any party other than an agency." Section 3(g), 80 Stat. 251. When the statute was codified by P.L. 90-23, 81 Stat. 54, this definition was incorporated into exemption (5) to give the present wording of 5 U.S.C. 552(b)(5), "available by law to a party other than an agency * * *."

materials "dealing solely with matters of law or policy." 1965 House Hearings at 3. Statements submitted to the subcommittee also indicated that the Exemption was not broad enough, since it would not cover factual material. *E.g.*, 1965 House Hearings, pp. 27-28; 49; 208; 220; 223-224; 229-240; 245-246; 255 and 256.[19]

The House Committee reported favorably the Senate bill, but with the same change in Exemption 5 that the Senate Committee had made. The House Report explained (H. Rep. No. 1497 at p. 10):

---

[19] See, for example, these pertinent comments:

Bureau of the Budget, p. 208:

> * * * it is not apparent to us how there could be worthwhile discussion of law or policy unrelated to a specific set of facts. The effect of the above language would be to require disclosure of most Bureau records, even though they relate only to internal matters of a nonpublic nature.

Department of Defense, p. 220:

> * * * If agency decisions by superiors are to be made with the benefit of full, frank, and open discussion, and recommendations by and between subordinates, these comments and recommendations must have the protection of privileged information. Otherwise, every memorandum would be carefully written with a view toward its possible impact on the public. * * * The difficulty of writing a memorandum of law or policy without including factual matters would have the effect of either denying the privilege to many memorandums that should be protected or prompting artifical memorandums splitting, with factual memorandums cross-referenced to policy or legal memorandums on the same subject.

> Agency witnesses argued that a full and frank exchange of opinions would be impossible if all internal communications were made public. They contended, and with merit, that advice from staff assistants and the exchange of ideas among agency personnel would not be completely frank if they were forced to "operate in a fishbowl." Moreover, a Government agency cannot always operate effectively if it is required to disclose documents or information which it has received or generated before it completes the process of awarding a contract or issuing an order, decision or regulation. This clause is intended to exempt from disclosure this and other information and records wherever necessary without, at the same time, permitting indiscriminate administrative secrecy. S. 1160 exempts from disclosure material "which would not be available by law to a private party in litigation with the agency". Thus, any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public.

This legislative history shows that Congress, in response to criticism that the earlier drafts of Exemption 5 were too narrow because they did not cover documents containing factual as well as policy statements, broadened the exemption to cover such material. Nothing in the broader exemption Congress ultimately adopted indicates that the courts were to cull the factual portions from such documents and disclose them.

B. ***The Factual Portions of Memoranda that Exemption 5 Covers Should not be Disclosed.***

Sharp lines cannot ordinarily be drawn between the two categories of factual and policy material, and factual statements frequently blend into and become a part of policy recommendations. The making by subordinates of frank and often controversial recommendations would be inhibited unless the factual presentations and analyses upon which these recommendations were based were given the same protection against disclosure as the ultimate recommendations themselves.

The information upon which recommendations rest and which they reflect thus necessarily "is inextricably intertwined with policymaking processes" (Pet. App. 28). Contrary to the unstated assumption upon which the court of appeals based its decision, the two categories of material in a particular document cannot be broken down into such separate elements.

The need to protect the "policymaking decisional process" by avoiding disclosure that would inhibit the giving of candid advice—which the court of appeals recognized (*ibid.*)—is particularly important in this case. For here the recommendations were made and the information and its evaluation were submitted by top-level government officials directly to the President for his use in deciding whether to authorize a major nuclear test that had obvious important national defense and foreign policy implications. The President must have—and is entitled to have—complete candor from his advisers, and the latter

must be certain that the confidentiality of what they tell the President will be respected. It would, we submit, seriously interfere with the proper operation of the office of the President if any part of such material routinely could be made public under the Freedom of Information Act. Congress did not intend Exemption 5 to have that unfortunate effect.

C. *The Factual Material in These Documents Could Not Be Routinely Obtained in Discovery Proceedings.*

The court of appeals decision apparently rests to some extent upon its prior decisions in discovery proceedings directing *in camera* inspection of factual reports in government files in order to weigh a party's need to those reports against a governmental claim of privilege. See *Boeing Airplane Co.* v. *Coggeshall*, 280 F. 2d 654 (C.A.D.C.); *Machin* v. *Zuckert*, 316 F. 2d 336 (C.A.D.C.), certiorari denied, 375 U.S. 896.[20] Assuming *arguendo* the correctness of those decisions and their applicability to the national security materials here involved (but cf. *United States* v. *Reynolds*, *supra*), they do not support the court's decision.

The standard for disclosure under Exemption 5 is whether the material would be "available by law to a party other than an agency in litigation with the

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[20] In *Soucie* v. *David*, 448 F. 2d 1067, 1077-1078 (C.A.D.C.), referred to in the opinion below on this point (Pet. App. 28), the court below made it clear that the principle of these discovery cases was the one upon which it relied to support its construction of Exemption 5.

agency." The question, however, is not whether a party could conceivably obtain a particular document through discovery, but whether it would "routinely be disclosed to a private party through the discovery process". H. Rep. No. 1497 at 10. The court below previously recognized this standard. In *Sterling Drug, Inc.* v. *Federal Trade Commission*, 450 F. 2d 698, 705 (C.A. D.C.), it stated:

> * * * The correct test for determining which documents are not exempt under § 552(b)(5) is given in the House Committee's report on the section, which states that "any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." H.R. Rep. No. 1497, 89th Cong., 2d Sess. 10 (1965). * * * The question for decision is thus whether " 'a private party' —not necessarily the applicant—would routinely be entitled to [the Commission memoranda] through discovery." [Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 796.] The clear answer is that he would not be so entitled. While some cases suggest that government memoranda containing legal analyses and recommendations may in some circumstances be subject to discovery, it is beyond question that granting discovery of such documents is a very extraordinary step, not a routine one. Accordingly, we conclude that the Commission memoranda in question here are the type which should be exempt under § 552(b)(5). [Footnote omitted.]

There can be no question that documents prepared solely to advise the President with respect to the making of a major nuclear test would not "routinely" be ordered disclosed in private litigation Cf. *United States* v. *Reynolds, supra.* Even apart from the problems of secrecy discussed in part one, there is thus no reason for an *in camera* inspection of these documents.

CONCLUSION

The judgment of the court of appeals should be reversed, and the judgment of the district court reinstated.

Respectfully submitted.

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MAY 1972.

APPENDIX A

The Freedom of Information Act, 5 U.S.C. 552, provides:

§ 552. Public information; agency rules, opinions, orders, records, and proceedings.

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; and

(C) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, or staff manual or instruction. However, in each case the justification for the deletion shall be explained fully in writing. Each agency also shall maintain and make available for public inspection and copying a current index providing identifying information for the public as to any matter issued, adopted, or promulgated after

July 4, 1967, and required by this paragraph to be made available or published. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules stating the time, place, fees to the extent authorized by statute, and procedure to be followed, shall make the records promptly available to any person. On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. In the event of noncompliance with the order of the court, the district court may punish for contempt the responsible employee, and in the case of a uniformed service, the responsible member. Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and

shall be assigned for hearing and trial at the earliest practicable date and expedited in every way.

(4) Each agency having more than one member shall maintain and make available for public inspection a record of the final votes of each member in every agency proceeding.

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by,

on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.

APPENDIX B

Executive Order 10501, as amended, 3 C.F.R. 292 (Jan. 1, 1971) provides in pertinent part:

EXECUTIVE ORDER 10501—SAFEGUARDING OFFICIAL INFORMATION IN THE INTERESTS OF THE DEFENSE OF THE UNITED STATES [AS AMENDED]

* * * *

WHEREAS it is essential that the citizens of the United States be informed concerning the activities of their government; and

WHEREAS the interests of national defense require the preservation of the ability of the United States to protect and defend itself against all hostile or destructive action by covert or overt means, including espionage as well as military action; and

WHEREAS it is essential that certain official information affecting the national defense be protected uniformly against unauthorized disclosure:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes, and as President of the United States, and deeming such action necessary in the best interests of the national security, it is hereby ordered as follows

Section 1. Classification categories. Official information which requires protection in the interests of national defense shall be limited to three categories of classification, which in descending order of importance shall carry one of the following designations: Top Secret, Secret,

or Confidential. No other designation shall be used to classify defense information, including military information, as requiring protection in the interests of national defense, except as expressly provided by statute. These categories are defined as follows:

(a) *Top Secret.* Except as may be expressly provided by statute, the use of the classification Top Secret shall be authorized, by appropriate authority, only for defense information or material which requires the highest degree of protection. The Top Secret classification shall be applied only to that information or material the defense aspect of which is paramount, and the unauthorized disclosure of which could result in exceptionally grave damage to the Nation such as leading to a definite break in diplomatic relations affecting the defense of the United States, an armed attack against the United States or its allies, a war, or the compromise of military or defense plans, or intelligence operations, or scientific or technological developments vital to the national defense.

(b) *Secret.* Except as may be expressly provided by statute, the use of the classification Secret shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could result in serious damage to the Nation, such as by jeopardizing the international relations of the United States, endangering the effectiveness of a program or policy of vital importance to the national defense, or compromising important military or defense plans, scientific or technological developments important to national de-

fense, or information revealing important intelligence operations.

(c) *Confidential.* Except as may be expressly provided by statute, the use of the classification Confidential shall be authorized, by appropriate authority, only for defense information or material the unauthorized disclosure of which could be prejudicial to the defense interests of the nation.

* * * *

Section 3. Classification. Persons designated to have authority for original classification of information or material which requires protection in the interests of national defense under this order shall be held responsible for its proper classification in accordance with the definitions of the three categories in section 1, hereof. Unnecessary classification and over-classification shall be scrupulously avoided. The following special rules shall be observed in classification of defense information or material:

(a) *Documents in General.* Documents shall be classified according to their own content and not necessarily according to their relationship to other documents. References to classified material which do not reveal classified defense information shall not be classified.

(b) *Physically Connected Documents.* The classification of a file or group of physically connected documents shall be at least as high as that of the most highly classified document therein. Documents separated from the file or group shall be handled in accordance with their individual defense classification.

(c) *Multiple Classification.* A document, product, or substance shall bear a classification at least as high as that of its highest classified component. The document, product, or substance shall bear only one over-all classification, notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications.

(d) *Transmittal Letters.* A letter transmitting defense information shall be classified at least as high as its highest classified enclosure.

* * * *

SEC. 7. *Accountability and Dissemination.* Knowledge or possession of classified defense information shall be permitted only to persons whose official duties require such access in the interest of promoting national defense and only if they have been determined to be trustworthy. Proper control of dissemination of classified defense information shall be maintained at all times, including good accountability records of classified defense information documents, and severe limitation on the number of such documents originated as well as the number of copies thereof reproduced. The number of copies of classified defense information documents shall be kept to a minimum to decrease the risk of compromise of the information contained in such documents and the financial burden on the Government in protecting such documents. The following special rules shall be observed in connection with accountability for and dissemination of defense information or material:

(a) *Accountability Procedures.* Heads of departments and agencies shall prescribe such ac-

countability procedures as are necessary to control effectively the dissemination of classified defense information, with particularly severe control on material classified Top Secret under this order. Top Secret Control Officers shall be designated, as required, to receive, maintain accountability registers of, and dispatch Top Secret material.

(b) *Dissemination Outside the Executive Branch.* Classified defense information shall not be disseminated outside the executive branch except under conditions and through channels authorized by the head of the disseminating department or agency, even though the person or agency to which dissemination of such information is proposed to be made may have been solely or partly responsible for its production.

* * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-909

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners,

—v.—

PATSY T. MINK, *et al.*,
Respondents.

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

Interest of Amicus[1]

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 180,000 members dedicated solely to preservation of the liberties safeguarded by the Bill of Rights. During its fifty-two year existence the ACLU has been particularly concerned with the freedoms protected by the First Amendment to the Constitution. In the past several years, the ACLU has also represented citizens requesting disclosure of information from executive agencies of the government.

The right to know how the government is discharging its duties is essential to a people who would be their own

[1] Letters from each of the parties, consenting to the submission of this Brief, have been filed with the Clerk.

governors. It was to further the system of freedom of information established by the First Amendment that Congress passed the Freedom of Information Act. Amicus believes that this case poses important questions concerning the proper reach of the Act and involves issues critical to the continued existence of an informed citizenry.

Questions Presented

Does a United States District Court have authority under the Freedom of Information Act to review classified documents *in camera* to determine whether component parts of such documents were not separately classified as secret and therefore could not be withheld under the (b)(1) exemption to disclosure under that Act?

Does a District Court have authority under the Freedom of Information Act to conduct an *in camera* review to determine whether *factual* elements of memoranda containing policy discussions can be separated from the file and disclosed to the public under the Act?

ARGUMENT

Statement of the Case and Introduction

The respondents, 33 Members of Congress, commenced this action under the Freedom of Information Act, 5 U.S.C., section 552 (hereafter the "Act"), to compel petitioners to release certain documents pertaining to an underground nuclear test explosion scheduled to take place on Amchitka Island, Alaska. The nine documents sought were prepared in connection with a study of the proposed test by a committee under the chairmanship of the Undersecretary of State, John N. Irwin, II.

Petitioners resisted disclosure, claiming exemptions under subsections (b)(1) and (b)(5) of the Act. Solely on the basis of an affidavit submitted by petitioner Irwin, petitioners moved for summary judgment in the District Court. The affidavit asserted that eight of the nine documents "involve highly sensitive matter that is vital to our national defense and foreign policy" (Joint Appendix at 29 [hereinafter cited as Jt. App.]), and that all of the documents "were prepared solely for the purpose of giving advice to the President . . ." (Jt. App. at 29). No factual basis is given for this conclusion. On the other hand, the affidavit suggested that some of the documents in question were being withheld solely because of their physical attachment to other documents, and that none of the documents had been *specifically* classified secret by Executive order.[2] The

[2] The affidavit stated that the documents had been classified under Executive Order 10501, which establishes a *general* classification scheme for all executive agencies (Jt. App. at 27).

nature of the Irwin affidavit is underscored by the subsequent statement of petitioner Ruckelshaus, whose memorandum is one of the documents at issue, that "[t]here was nothing in my comments that needs to be stamped 'top secret'" (Jt. App. at 57).

The District Court granted petitioners' motion for summary judgment solely on the basis of the Irwin affidavit and without examining any of the documents in question. On respondents' expedited appeal, the Court of Appeals reversed and remanded the case to the District Court for further consideration, and petitioners obtained a writ of certiorari from this Court.

The issue on this appeal is narrow. It is whether the federal courts are to play any role in reviewing refusals of the Executive Department to disclose information pursuant to the Freedom of Information Act, or whether the mere incantation by administrative agencies of the statutory exceptions to disclosure, see 5 U.S.C. §552(b), will foreclose judicial scrutiny of such refusals.

The language and the legislative history of the Act indicate that judicial review is an elemental part of the statutory scheme. Thus, the Act states:

> On complaint, the district court of the United States . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action. 5 U.S.C. §552 (a)(3).

The House Report accompanying the bill elaborated:

> [The bill] contains a specific remedy for any improper withholding of agency records by granting the United States district courts jurisdiction to order the production of agency records improperly withheld . . .
>
> The proceedings are to be de novo so that the court can consider the propriety of the withholding instead of being restricted to judicial sanctioning of agency discretion. The Court will have authority . . . to enjoin the agency from withholding its records and to order the production of agency records improperly withheld.[3]

The Congress felt that meaningful judicial review was so important to the success of the proposed statute that it further provided that, with certain exceptions:

> [P]roceedings before the district court as authorized by this paragraph shall take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way. 5 U.S.C. §552 (a)(3).

If these procedural guarantees of judicial review are to be more than formalities, a district court must be permitted to look beyond the mere assertion of a statutory exemption by an administrative agency. The court must determine as a matter of law whether the claimed exemption was properly invoked. This is all that the Court of Appeals directed

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[3] H.R. Rep. No. 1497, 89th Cong. 2d Sess. 9 (1966). See also, S. Rep. No. 813, 89th Cong. 1st Sess. 3 (1965). The House Report also made it clear that the burden of proof is on the agency as "the only party able to justify the withholding." *Id.*

in this case. Moreover, that court was careful not to impinge unduly on the Executive's authority over foreign policy and defense. Amicus submits that anything less than the review called for by the decision below would emasculate the disclosure requirements of the Act.

Contrary to the representations in the Government's brief at 21, the opinion of the Court of Appeals does *not* call for an independent judicial evaluation of the propriety of withholding specific information for reasons of national defense or security. With reference to subsection b(1) of section 552—the foreign affairs and security exemption—the Court of Appeals made only two narrow holdings, and it reserved decision on a third question pending a more thorough treatment on remand and possible subsequent appeal.

First, the Court of Appeals directed the District Court to:

> . . . take evidence on whether, and to what extent, the file contains documents that are now within the umbrella of a secret file but which would not have been independently classified as secret. Such documents are not entitled to the secrecy exemption of subdivision (b)(1) solely by virtue of their association with separately classified documents. Appendix to Petition for Writ of Certiorari at 27 [hereafter cited as App.].

The District Court was not asked to determine itself whether documents in the file should have been classified, but only to determine which documents *the Executive* had concluded did not warrant secrecy classifications. The Government does not challenge this aspect of the opinion below. See Brief for Petitioners, footnotes 5, 7 and 12, pages 6, 8 and 17.

Second, the Court of Appeals required the District Court to review the file to determine whether or not component parts of the classified documents bear the same secrecy classification as the unified document. If not, and if "the non-secret components are separable from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed." App. at 27. Again, the District Court is not asked to substitute its judgment for that of the Executive, but is merely directed to determine whether the Executive found that certain information did not require a secrecy classification.

Finally, the Court of Appeals declined to decide either whether classification of documents pursuant to Executive Order 10501 was sufficient to meet the requirements of subsection (b)(1) of the Act, or whether a separate executive order is required for each document or group of documents withheld under the (b)(1) exemption. The court concluded that:

> [S]ummary disposition of this issue by this court is inappropriate, and should be the subject of a full consideration on the merits by this court if the appeal is continued following the disposition on remand. App. at 24.

Thus, the only issue which this Court must decide now as to the (b)(1) exemption is whether the District Court has authority to review the file to determine whether component parts of documents have not been separately classified by the Government as secret and therefore must be released.

We urge this Court to affirm the holding below. This would permit the lower courts to consider the issues not

reached by the Court of Appeals, if appropriate after full presentation on remand. If this Court should decide to hear the reserved questions, amicus urges that the classification procedures of the Executive be disapproved, as indicated below in Sections 1B and 1C of this brief.

I.

The Court below was correct in directing the District Court to review the documents *in camera* to determine whether component parts of such documents were not classified and therefore could not be withheld under the (b)(1) exemption of the Freedom of Information Act.

A. *Separable unclassified components of classified documents must be released under the Act.*

Executive Order 10501, the document relied upon by the Government as authority for its classification actions, plainly contemplates that component parts of documents may bear different classifications from the document as a whole. Executive Order 10501, Section 3(c), 3 C.F.R. 292 (Jan. 1, 1971). As Deputy Assistant Secretary of Defense Cooke stated in testimony before the Foreign Operations and Government Information Subcommittee of the House Committee on Government Operations 92nd Cong., 1st Sess. (1971) [hereafter, Moorhead Hearings]:

> Most documents containing classified information include information which is not classified as well as other information which is classified at different levels of classification . . . Individual portions of a document should be marked to show the classifications applicable to information contained therein. Moorhead Hearings, pt. 2, at 393 (June 29, 1971).

The Executive Order does not prohibit the release of such component parts that have been separated from the whole. The Order merely requires that the *unified* document be classified at least as high as that of its highest classified component, and that it bear only one classification. Executive Order 10501, 3 C.F.R. 292 (Jan. 1, 1971), Section 3(c). This, of course, is logical. When it is treated as part of a unified document, a classified component must impose its level of classification on the entire document because disclosure of the unified document would reveal the classified component. But this in no way suggests that the unclassified components of that unified document cannot be released *separately* if the public interest, as expressed by Congress, so demands.[4]

The passage of the Freedom of Information Act subsequent to the original proclamation of Executive Order 10501 is just such a congressional expression, and requires that, where practicable, such information be released. The Act was based on the philosophy that an informed public is essential to the proper functioning of a representative democracy. As then-President Johnson said upon signing the new law:

> This legislation springs from one of our most essential principles: a democracy works best when the people have all the information that the security of the Nation permits . . . 2 Weekly Compilation of Presidential Documents 895, July 11, 1966.

The Reports of the House and Senate Committees that considered the Act reflected similar viewpoints. The House

[4] Indeed, the Order specifically states that "pages, paragraphs, sections, or components" of a document may bear different classifications from the document as a whole. *Id.* §3(c).

Committee on Government Operations concluded, for example, that:

> A democratic society requires an informed, intelligent electorate, and the intelligence of the electorate varies as the quantity and quality of its information varies. A danger signal to our democratic society in the United States is the fact that such a truism needs repeating... House Report No. 1497, *supra* at 12. See also Senate Report No. 813, *supra* at 3.

This principle is reflected in the First Amendment, which protects not only the right of citizens to speak and publish, but also the right of the public to receive and hear such speech and information. See *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943); *Lamont* v. *Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan & Goldberg, JJ., concurring); *Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964); see generally *Office of Communication of United Church of Christ* v. *F.C.C.*, 359 F.2d 994 (D.C. Cir. 1966). Thus, the Act must be seen as an affirmative effort on the part of Congress to give meaningful content to the system of freedom of expression as provided by the First Amendment. See Emerson, *The System of Freedom of Expression* (1971), Chapter XVII.

Congress and the President were, of course, cognizant of the competing security interests of defense and foreign policy. It was to accommodate these interests that subsection (b)(1) was included in the Act. Yet Congress clearly indicated that protection of such security interests should not be read to require that the public interest in disclosure "either be abrogated or substantially subordinated." Senate Report No. 813, *supra* at 3. Rather,

> [s]uccess lies in providing a workable formula which encompasses, balances, and protects all interests, *yet places emphasis on the fullest responsible disclosure.* *Id.* (emphasis added).

Amicus submits that the opinion below provides such a "workable formula". It protects those components of documents that the Executive has found require secrecy, while permitting the maximum possible disclosure of information which the Executive itself has determined need not be *independently* protected. Indeed, the Executive's sole rationale for withholding the documents at issue in this case is to maintain the secrecy of *other* documents whose disclosure is not sought by the respondents. This rationale is unnecessarily broad to protect the legitimate interests of national security.

This Court previously has dealt with similar situations in which the interest in national security was pitted against First Amendment values. In *Lamont* v. *Postmaster General*, 381 U.S. at 302, the Court struck down a statute providing that foreign-based mail determined by the Secretary of the Treasurer to be " 'communist political propaganda,' shall be detained by the Postmaster General . . . and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request." It was held that the statute was invalid, despite the claim of national security, because it created an undue deterrent effect on the First Amendment right to receive foreign mail.[5]

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[5] Similarly, in *United States* v. *Robel*, 389 U.S. 258 (1967), the Court held that the government could not forbid a Communist from working in a non-sensitive position in a defense plant. While the

With the passage of the Freedom of Information Act, Congress acted consistently with this line of cases interpreting the First Amendment in a national security setting. Its "workable formula" seeks to place the least restrictive alternative upon the exercise of freedom of expression. The formula was necessary to protect against abuses of over-classification in violation of the will of Congress. The holding below is essential to realize this legislative purpose, for if a court had no authority to review and order the release of unclassified components, an enormous loophole would be opened in the legislative and constitutional mandate.

B. ***The Executive can withhold a document or group of documents under the b(1) exemption of the Act only by issuing an order directing that that specific document or group of documents be kept secret.***

Amicus re-emphasizes that the issues dealt with in this and the succeeding subsection of the Brief are not properly before the Court at this time, and are not necessary to its decision. The arguments are put forward in the event that the Court exercises its discretion to decide them at this time.

Petitioners claim that classification of a document pursuant to Executive Order 10501 automatically protects it from disclosure under the b(1) exemption of the Act, and that a specific executive order concerning each document or groups of documents is not required. But the language

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Court recognized the legitimate concern with the national security, it found that "Congress must achieve its goal by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms." 389 U.S. at 268. Cf. *United States* v. *Brown*, 381 U.S. 437 (1965).

and general purpose of the Act to eliminate excessive Executive secrecy, and the actual practice of over-classification under Executive Order 10501, precludes such an interpretation.

Subsection b(1) of the Act exempts from disclosure matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." The language of the statute demonstrates that Congress desired the Executive to consider each matter that might require secrecy, and to issue an order to that effect if a decision to refuse a request for disclosure under the Act is made.[6] A classification under Executive Order 10501 does not meet that test.

The congressional purpose underscores the express requirement of the statute. It reflects the distrust of unbridled executive authority that motivated the founding fathers in forging the constitutional scheme. See Sen. Report No. 813, *supra,* at 2-3; House Report No. 1497, *supra,* at 8.

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[6] The Act does not require that the President make every classification decision in the Executive Department. A general executive order in which the chain of authority to classify is clearly specified and severely limited and in which the standards of classification are plainly and narrowly defined would suffice for the day-to-day classification decisions. It is only when a specific request for disclosure under the Act is made that a Presidential order is required to continue to withhold the matter sought. This requirement does not place an undue burden upon the Office of the President, as indicated by the fact that the President elsewhere is required to specifically certify the withholding of other information such as the use of special foreign assistance funds under 22 U.S.C. §2364. See, for example, 37 Fed. Reg. 12245 (June 21, 1972) where it was noted that the President had made a determination under §2364(a) and that "The President has concluded that publication of the said determination in the Federal Register would be harmful to the national security of the United States."

The Act recognizes the discretion of the Executive in the foreign policy and defense areas, but insofar as the consequence of this discretion is to withhold information from the public, it is tolerated out of necessity, and limited as far as possible. Such toleration is possible because of the qualities of the American Presidency that reduce—but do not eliminate—the dangers of arbitrary executive action. The President must stand for election every four years and he can be held accountable for his action. When he, or his publicly designated responsible high subordinate, states that a matter requires secrecy, a degree of deference must be given the decision.[7] However, when decisions to withhold information from the public are made by lesser officials with no electoral mandate, then public control over such impingements on First Amendment freedoms is considerably lessened. The identifiable and accountable figure of the President is replaced by anonymous middle-level bureaucrats responsible perhaps only to their immediate superiors and in fact often to no one at all. It was to remedy the problems associated with excessive administrative secrecy that the Act was passed. Both the Senate and House Reports found that the old provisions of the Administrative Procedure Act, intended to provide for disclosure of information, had been turned instead into a device for administrative withholding of such information:

> Under the present [pre-Freedom of Information Act] section 3 [of the Administrative Procedure Act], *any Government official* can under color of law withhold almost anything from any citizen under the vague

[7] Nevertheless, such decision is not free of judicial control. See *United States* v. *Reynolds*, 345 U.S. 1, 8 (1953); *Epstein* v. *Resor*, 421 F.2d 930 (9th Cir. 1970); *infra*, part I(C).

> standards—or, more precisely, lack of standards—in section 3. It would require almost no effort for *any* official to think up a reason why a piece of information would be withheld . . . And even if his reason had not a scintilla of validity, there is absolutely nothing that a citizen seeking information can do because there is no remedy available. Senate Report, *supra* at 5; House Report, *supra* at 10 (Emphasis added).

It is inconceivable that a Congress so strongly expressing its displeasure at past classification practices by anonymous administrative officials under vague, non-reviewable standards meant to perpetuate such practices in passing reform legislation. Congress emphasized that it was passing "not a withholding statute but a disclosure statute," and sought to avoid the use of "vague phrases" and to replace them with "specific and limited types of information that may be withheld." Senate Report, *supra* at 5; House Report, *supra* at 11.

The continued blanket reliance on Executive Order 10501 undercuts the congressional purpose by perpetuating the situation that Congress attempted to remedy. The definitions of the Order are hopelessly vague and have allowed the Executive Branch, almost at will, to place a shroud of secrecy over information.[8] Equally alarming as the

[8] Executive Order 10501 establishes three categories of classified information: TOP SECRET, SECRET, and CONFIDENTIAL. Each category is defined, but in terms so broad and unconfined that the bureaucrat who classifies the information is lodged with untrammelled discretion, and reviewing courts are provided with no standards by which that administrative discretion may be reviewed. Under the Executive Order, then, the bureaucrat is empowered to license public information, but without the "narrow, objective and

loose definitions is the failure of the Order to limit effectively the number and position of those authorized to classify under the Order.[9]

The large number of officials with authority to "originally" classify materials, described in footnote 9, is only the tip of the iceberg. The practice of "derivative classification" makes it nearly impossible to limit the number of officials with classification authority. In the Department of Defense alone, one witness before the Moorhead Subcommittee estimated that "hundreds of thousands" of people may issue derivative classification stamps. Moorhead Hearings, *supra*, pt. 1, p. 98 (Statement of William G. Florence, former Deputy Assistant Secretary for Security

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definite standards to guide the licensing authority . . . " that are required under the First Amendment. *Shuttlesworth* v. *Birmingham*, 394 U.S. 147, 150-51 (1969); *Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676 (1968).

[9] Section 2(a) of the Order lists thirty-four departments and agencies whose heads have authority for original classification, and who may delegate that authority without limit. Section 2(b) lists twelve additional departments and agencies whose heads may classify, but who may not delegate such authority. Executive Order 10501, Section 2, 3 CFR 292 (1971). Those department heads with power to delegate classification authority have done so extensively. There are approximately 5100 government officials with original "TOP SECRET" classification authority, alone. See *New York Times*, March 9, 1972, p. 12, col. 5; *Developments in the Law—The National Security Interest and Civil Liberties*, 85 Harv. L. Rev. 1130, 1200 (1972).

According to the testimony of Deputy Assistant Secretary Cooke before the Moorhead Subcommittee, 31,048 people in the Department of Defense may exercise original classification authority, of whom 7687 may classify matters as "SECRET", and 803 may classify matters as "TOP SECRET". Moorhead Hearings, *supra*, pt. 2 at p. 599. The situation in the other departments is little better. Deputy Under Secretary of State William Macomber testified before the same subcommittee that about 6000 State Department officials have original classification authority. Moorhead Hearings, *supra*, pt. 3, at 918.

and Trade Affairs). See Department of Defense Instruction No. 5210.47, Section V(B). The Harvard Law Review recently described the practice as follows:

> A derivative classification must be applied to a document that makes use of classified information. Even if classified information is not used in the second document, a derivative classification may be applied if the individual responsible for the document determines that it is sufficiently related to the classified information to warrant classification . . . Since anyone with access to classified documents has authority to impose a derivative classification, the number of government employees who actually classify documents is huge. *Developments in the Law,* 85 Harv. L. Rev., *supra,* at 1200.

Suffice it to say, virtually unlimited original and derivative classification power has led to massive overclassification of documents.[10]

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[10] According to testimony before the Moorhead Subcommittee, there are over 20 million classified documents in the Department of Defense alone (Statement of Deputy Assistant Secretary David Cooke, *supra,* pt. 2, pp. 658-659), and over two million classified documents in the State Department. There was universal agreement among the expert witnesses at the hearings that the vast majority of such documents did not warrant secrecy classifications. For example, former United Nations Ambassador and Supreme Court Justice Arthur Goldberg stated: "I have read and prepared countless thousands of classified documents. In my experience, 75 percent of these documents should never have been classified in the first place; another 15 percent quickly outlived the need for secrecy; and only about 10 percent genuinely required restricted access over any significant period of time." *Id.,* pt. 1, p. 12. And former Pentagon security specialist William Florence believed that "less than one-half of 1 percent of the different documents which bear currently assigned classification markings actually contain information qualifying for even the lowest defense classification under Executive Order 10501." *Id.,* pt. 1, p. 97.

Petitioners reliance on references to Executive Order 10501 in the legislative history of the Act is erroneous and misleading.[11] The only reference either by the Senate or House Committee is in the House Report, where the Committee said:

> [C]itizens both in and out of Government can agree to restrictions on categories of information which *the President has determined must be kept secret* to protect the national defense or to advance foreign policy, *such as* matters classified pursuant to Executive Order 10501. H.Rep. No. 1497, *supra,* at 9-10 (emphasis added).

This passage indicates that the President must determine whether or not a matter is to be withheld from disclosure under the Act. The reference to the Executive Order is merely suggestive of the kinds of information that the President might order withheld. It does not say

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[11] Since the Court of Appeals issued its decision in this case, the President has issued a new Executive Order 11652, 37 Federal Register 5209 (March 10, 1972), to replace Executive Order 10501, effective June 1, 1972.

While the new Executive Order has no bearing on the issues in this case, see §5(d) it should be observed that it does nothing to remedy the proliferation of classification authority that existed under its predecessor, and, in fact, may make matters worse. The Order permits department heads to delegate full classification authority to their (unnamed and unnumbered) principal deputies and assistants, and the deputies and assistants of major elements of such Department. Moreover, anyone upon whom "TOP SECRET" classification authority has been conferred may, in turn, designate *any* of his subordinates to classify matters as "SECRET", and anyone with authority to classify as "TOP SECRET" or "SECRET" may designate *any* of *his* subordinates to classify matters as "CONFIDENTIAL". And the definitions of these categories are even broader and less confined than were the definitions under Executive Order 10501.

or imply that the order, of itself, is sufficient authority to refuse disclosure under the Act.[12]

In conclusion, the language and purpose of the Act indicate that once a specific request for disclosure of a matter is made under the Act, a refusal to release the requested material can be justified only when the President issues a *specific* order that the matter is privileged under the b(1) exemption.

C. *Federal courts have authority to review the merits of government secrecy classifications, at least to determine whether the Executive's classification privilege has been arbitrarily and capriciously asserted.*[13]

The government claims authority to classify national security material, free from *any* interference from the judicial or legislative branches. This alleged unbridled discretion is said to flow from the President's foreign affairs and national defense power, *United States* v. *Curtiss-Wright,* 299 U.S. 304 (1936), and is said to be recognized inherently in the Constitution and explicitly in section b(1) of the Act.

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[12] The comments of two Congressmen on the House floor are even less persuasive. First, the views of individual Congressmen have little probative value, compared to committee reports. The committees gave the bills intensive study and their reports represent the finely considered views of those Congressmen who together were responsible for drafting the legislation. Comments on the floor, however, are spontaneous, and represent the views only of the person stating them, and not the other 534 Senators and Representatives who may vote on the bill. See the concurring and dissenting opinions of Justices Jackson and Frankfurter in *Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341 U.S. 384 (1951).

[13] Amicus again notes that this issue is not necessary for decision by the Court at this time. See pages 7 and 12, *supra.*

The Executive has the right to keep certain information secret in the national interest, but that is not the question here.

> The fundamental issue underlying the constitutional question whether particular information should be disclosed is who should decide what *classes* of information should not be disclosed and whether particular information is within one of the classes. *Developments in the Law,* 85 Harv. L. Rev. *supra* at 1219.

This issue involves more than the scope of the executive power to protect the national security. It implicates the public's right to receive information under the First Amendment, discussed above, and the constitutional scheme of separation of powers among the three branches of government.

The system of checks and balances was built into the Constitution to assure a government of laws, free from the arbitrary rule of executive authority. As Justice Brandeis stated in a now-famous dissent:

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy. *Myers* v. *United States,* 272 U.S. 52, 293 (1926). Quoted by Justice Frankfurter in *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U.S. 579, 613-614 (1952) (concurring opinion).

The theory propounded by the government here goes far beyond allowing the executive department to operate freely within the bounds of its proper authority. Instead, it would remove the "friction" of congressional limitation and judicial review necessary to confine that authority within narrow limits. It encourages the executive branch to act behind a veil of secrecy, denying the people their right to know what their government is doing and to hold it accountable for its actions. It does this by ignoring the basic doctrine that questions of constitutional and statutory interpretation ultimately are to be resolved by an impartial judiciary.

This Court and other federal courts have not hesitated to uphold the essential role of the judiciary in reviewing executive actions, even under the war or foreign affairs power. In *Ex Parte Milligan*, 71 U.S. 2 (1866) the Court held that the President did not have the power in wartime to establish military tribunals to try civilians as long as the civilian courts still functioned. It rejected government claims that the executive's wartime actions were immune from judicial review. Similarly, in *Youngstown Sheet and Tube Co.* v. *Sawyer, supra,* the Court enjoined the Secretary of Commerce from seizing and operating the nation's steel mills in the face of a wartime strike in that industry.

Finally, this Court has recognized the role of the judiciary in reviewing Executive refusals to disclose secret information dealing with the national security. In *Reynolds* v. *United States,* 345 U.S. 1 (1953), a plaintiff under the Tort Claims Act sought discovery of an Air Force official accident investigation report. Although discovery ultimately was refused, the Court held that "[j]udi-

cial control over the evidence in a case cannot be abdicated to the caprice of executive officers," 345 U.S. at 9-10, and that the applicability of an executive privilege must be determined by the courts.

A similar finding was made by the Ninth Circuit in *Epstein* v. *Resor*, 421 F.2d 930, 933 (1970). The court held that the Freedom of Information Act authorized the district court "to determine whether classification was arbitrary or capricious." However, an *in camera* review of the file was not warranted in *Epstein* because of evidence that a careful paper-by-paper review of the file had been made; there is no such evidence before this Court in the case at bar. Moreover, the court in *Epstein* found that the agency was not "hiding material under a filing system that gives top-secret classification to material simply because it relates, for filing purposes, to other material that is truly top secret." 421 F.2d at 933. In the instant case, the Court of Appeals was not able to make such findings, and directed the District Court to examine the file to answer just those questions.

The scope of review actually provided in the *Epstein* case, while considerably broader than that claimed by the government, was still too narrow. Both the First Amendment and the Freedom of Information Act mandate judicial review of classification. The standard for review may well be "arbitrary and capricious." Cf. *Developments in the Law*, 85 Harv. L. Rev. at 1222-23 (Executive's assertion must be at least arguably proper). But there is no way to determine whether classifications are arbitrary or capricious without reviewing the content of those classifica-

tions. Thus in order for the judiciary to exert some meaningful control over executive tendencies toward oversecrecy, pursuant to the mandate of the Act, it must review documents *in camera* to determine whether the Executive's classification privilege has been arbitrarily and capriciously asserted. This must be done, at least for matters classified under a general order such as Executive Orders 10501 or 11652, where the authority to classify is wide and overclassification is rampant.

When a showing can be made that the President himself (or perhaps a high Executive official *personally* designated by him) actually reviewed the document or file and *specifically* issued an order that it not be released, then the judicial inquiry may be more limited, as in *Epstein* v. *Resor, supra.* But that is not the practice with the overwhelming majority of classified documents, and it was not done with the file at issue in the present litigation.

II.

The Circuit Court was correct in directing an *in camera* review to determine whether *factual* elements of memoranda containing policy discussions could be separated from the file and disclosed to the public under the Act.

The Court of Appeals directed the District Court on remand to examine the documents *in camera* to separate out "factual data that can be disclosed without impinging on the policymaking decisional processes intended to be protected by this exemption." App. at 29. The court relied on its earlier decision in *Soucie* v. *David,* 448 F.2d 1067 (1971), to the effect that:

> while the exemption protects the decisional processes of the President, or other policymaking executive officials, it does not prevent the disclosure of *factual* information unless it is inextricably intertwined with policymaking processes. *Mink* v. *Environmental Protection Agency,* App. at 28 (emphasis added).

The holding below is required by the statute and the case law, and should be affirmed.

Initially, it should be recognized that there is no issue here of interference with executive discretion in sensitive defense and foreign policy areas. In particular, the subsection (b)(5) exemption does not involve questions of the Executive's discretion in these areas. In deciding (b)(5) questions, courts are directed to determine the issue "de novo," 5 U.S.C. 552 (a)(3), and they are not constricted by the deference to the President's authority that may operate with respect to subsection (b)(1).

In this context, the strong policy considerations in favor of maximum possible public disclosure are decisive. The Congress was cognizant of the First Amendment implications of an information statute, and acted to remove all but the minimal restraints to full disclosure. See *supra*, p. 10. The Fourth Circuit recently recognized this policy in strictly construing another of the exemptions to the law:

> After considering voluminous testimony on both sides and balancing the public, private, and administrative interests, Congress decided that the best course was open access to the governmental process with a very few exceptions. It is not the province of the courts to restrict that legislative judgment under the guise of judicially balancing the same interests that Congress has considered. *Wellford* v. *Harden*, 444 F.2d 21, 24-25 (1971).

Similarly, Congress has balanced the interests in favor of disclosure in the instant case, and has directed that the federal courts enforce its policy decisions against recalcitrant federal agencies.

A. *In applying the same standards that govern discovery practice under the Federal Rules of Civil Procedure to disclosure of information to the general public, the Act incorporates the distinction between disclosure of opinions and policy recommendations, on the one hand, and factual information, on the other.*

Subsection (b)(5) of the Act exempts from disclosure matters that are:

> inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

The language of this provision admits of a single interpretation: if the matter could be discovered by a private party in litigation in federal court, it must be publicly disclosed under the Act. See *Sterling Drug, Inc.* v. *Federal Trade Commission,* 450 F.2d 698, 705 (D.C. Cir. 1971); *Soucie* v. *David, supra; General Services Administration* v. *Benson,* 415 F.2d 878, 880 (9th Cir. 1969); *Consumers Union* v. *Veterans Administration,* 301 F. Supp. 796, 804 (S.D.N.Y. 1969).

In *Consumers Union, supra,* the court stated:

> To determine if the requirements of the fifth exemption are met, this court must ask if the records sought . . . would not be available to any party in any litigation in which the agency having the records might now be involved. The fulcrum of this test is discovery practices as regulated by the courts, not discovery as it is practiced by the government . . . *Id.* at 804.

The Ninth Circuit agreed that "the standards for decision are the discovery practices, as regulated by the courts." *General Services Administration* v. *Benson,* 415 F.2d at 880.

The distinction between discovery of factual information and discovery of advisory policy opinions and recommendations has been widely recognized by federal courts. Thus, discovery was denied in *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 327 (D.D.C. 1966), *aff'd* 384 F.2d 979 (D.C. Cir. 1967), on the grounds that the documents sought consisted *"wholly* of opinions, recommendations and deliberations relating to legal and other determinations." 40 F.R.D. at 327 (emphasis added). The court noted that "There is an obvious distinction, in terms

of necessity for inspection, between documents of this character and those which contain facts." The court rested its refusal to review *in camera* the documents in that case on the fact that such review could serve no useful purpose:

> Here inspection can satisfy no need for separation, for there appears nothing to separate; nor any need for balancing, with apparently nothing here to be weighed. *Id.* at 332.

In another case, the Ninth Circuit required disclosure under the Freedom of Information Act by applying the usual discovery standards of Rule 26(b), Fed. R. Civ. P., stating that discovery would be called for "especially insofar as . . . [the records at issue] are factual material rather than documents which comprise the administrative reasoning process of government." *General Services Administration* v. *Benson,* 415 F.2d at 880. Accord, *Reliable Transfer Co.* v. *United States,* 53 F.R.D. 24 (E.D.N.Y. 1971) ("The facts found by an investigating officer should be made available to the adversary under general principles of discovery"); *Sterling Drug Inc.* v. *Federal Trade Commission, supra; Consumers Union* v. *Veterans Admin.,* 301 F. Supp. at 805 ("To decide whether the records sought here are within the fifth exemption, this court must determine whether they were part of the deliberate process of the agency or were factual in substance"); *Soucie* v. *David, supra;* 4 Moore's Federal Practice ¶26.61[7], at 26-331 (2d ed. 1971).

Thus, the opinion below requiring the District Court to review the documents to disclose "factual information unless it is inextricably intertwined with policy making processes" is supported by other federal courts throughout the country.

Petitioners seek to invoke the language of the House Report regarding exemption b(5) to the effect that disclosure should be allowed only if discovery would be "routinely" permitted. See H.R. Rep. No. 1497, *supra*, at 10. To the extent that the language of the House Report at all qualifies the language of the statute, it supports the distinction between the disclosure of policy and disclosure of facts. The very case that petitioners rely upon in making their argument—*Sterling Drug Inc.* v. *Federal Trade Commission, supra*—noted that while discovery of memoranda containing legal analyses and recommendation was not routine, discovery of factual information contained within such memoranda was permitted. 450 F.2d at 704. Thus, the court below properly ordered *in camera* review of the documents to determine whether parts of the documents, with policy opinions deleted, should be disclosed. 450 F.2d at 704, 708.

B. *The Congressional history supports the conclusion of the Court below.*

Petitioners maintain that the change in the language of subsection b(5) from the original version in the earlier Senate and House bills constituted a change of substance by which Congress authorized the withholding of factual information as well as matters of law and policy. This argument is demonstrably not valid.

In 1964, the Senate Judiciary Committee of the 88th Congress reported out a bill exempting from disclosure "intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy."

The Senate Report accompanying the bill stated that all factual material was to be made available to the public,

but that some degree of secrecy was required *vis-à-vis* legal or policy matters.

> It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public scrutiny. It was argued, and with merit, that efficiency [of] Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were forced to "operate in a fishbowl." The Committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation. S. Rep. No. 1219, 88th Congress, 2d Session 6-7 (1964).[14]

When the proposed statute failed to clear the 88th Congress, it was re-introduced in the 89th Congress the next year. The Committee hearings revealed a fear that the narrow internal memorandum exemption might be read even more narrowly than Congress had intended. The fear stemmed from the language of the section, which seemed to apply the exemption from disclosure only to documents "dealing *solely* with matters of law and policy" (emphasis added), implying that documents consisting partly of factual information and partly of matters of law and policy would have to be revealed *in their entirety*. The

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[14] This paragraph was repeated in the Senate Report accompanying the final version of the bill that was enacted. S. Rep. No. 813, *supra* at p. 9. It was quoted in the Brief for Petitioners, p. 36, in an attempt to create the impression that the new language was intended to create a substantive change in the bill. On the contrary, the retention of the same explanatory paragraph implies no substantive change was intended in the scope of the proposed statute.

point was made that all policy discussions contained some factual references, and that if those references automatically made the policy discussions open to disclosure, the effect would be to stifle open and frank consideration of policy alternatives.[15] Since Congress did not intend such a result, the imprecise language was amended to protect policy discussions even when joined with factual material.

But Congress did *not* provide for the exemption of entirely factual matters. It merely applied the typical pretrial discovery standard by which policy matters are often excluded from factual discovery. See Section IIA, *supra*. As the District Court explained in *Consumers Union, supra*:

> The substituted language, being more precise, seems to be a refinement of the policy versus fact distinction so that the distinction can still be used within the discovery test now explicitly laid down by the statute. It is at least clear, in light of the strong Congressional drive to promote disclosure that the amendment was not intended to place "factual material" within the coverage of the fifth exemption. 301 F. Supp. at 805.

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[15] Thus, the statements at the hearings quoted by Petitioners in footnotes 17 and 19 of their Brief were directed at the probable consequences of having to reveal the law and policy portions of mixed fact-policy memorandums, and not at the consequences of revealing only the factual portions thereof. Thus, for example, the Department of Commerce requested that the "subsection . . . be amended to exempt also *such portions* of inter-agency or intra-agency memorandums or letters *as deal with matters of law or policy*." 1965 Senate Hearings, pp. 406-407 (emphasis added). This is precisely what Congress intended, and the new language was substituted to clarify that point.

CONCLUSION

Congress manifested its intention to accomplish two purposes through the Freedom of Information Act: first, to increase greatly the public's access to information that had previously been kept secret by administrative fiat, and second, to enable citizens aggrieved by agency refusals to disclose information to obtain a hearing *de novo* in a federal court, with the burden on the agency to sustain its action.

The opinion of the Court of Appeals in the instant case is thoroughly consistent with these congressional purposes. The position urged by the Government, on the other hand, would undermine the carefully constructed congressional scheme, reducing judicial review to a mere formality by which the Government need only restate in court its administrative decision to withhold the matters sought. The decision of the court below, should be affirmed.

Respectfully, submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-909

ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Petitioners*

v.

PATSY T. MINK, ET AL., *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENTS

STATUTE AND EXECUTIVE ORDERS INVOLVED

The Freedom of Information Act, 5 U.S.C. § 552, is reprinted as Appendix A in the petitioners' brief. Executive Order 10501, as amended, 3 C.F.R. at 306, is reprinted in part as Appendix B in the petitioners' brief. Executive Order 11652, 37 Fed. Reg. 5209, is reprinted as Appendix A in this brief.

QUESTIONS PRESENTED

1. Whether the Freedom of Information Act, 5 U.S.C. § 552, permits the government to withhold materials solely on the basis of its *ex parte* assertion that those materials have been generally classified "secret" pursuant to a 1953 executive order no longer in effect.

2. Whether the Act permits the government to withhold materials solely on its *ex parte* assertion that they are "advisory," even though they contain unclassified factual matter.

3. Whether the Act, which imposes on the government the burden of persuading the court in a *de novo* judicial proceeding that it is entitled to withhold requested materials, permits the government to meet that burden by resting solely upon *ex parte* assertions that the disputed materials are exempt under the Act, with no opportunity either for adversary testing of those assertions or an *in camera* inspection of the materials.

4. Whether the government may rely on the statutory exemptions in the Act to withhold information from Members of Congress who sue under the Act in their official capacities.

STATEMENT

The respondents are 33 duly elected and installed Members of the United States Congress.[1] They commenced this suit in the United States District Court for the District of Columbia under the Freedom of Information Act, 5 U.S.C. § 552, to compel the petitioners to disclose certain documents pertaining to an underground nuclear test, code-named "Cannikin,"

[1] The respondents are the named plaintiffs in the complaint (App. 3-7).

conducted at Amchitka Island, Alaska on November 6, 1971.[2] The respondents sought the materials to assist them in carrying out their legislative responsibilities in passing upon the Congressional appropriation for the Cannikin test (App. 9-10, 19-23). They sued both as Members of Congress and as members of the public.

Before the district court, the petitioners admitted the existence of the documents sought. Those documents—numbering nine in all[3]—are reports, memoranda, or letters prepared in connection with a study of the Cannikin test by a committee under the chairmanship of the Undersecretary of State, John N. Irwin, II (App. 28-29). Under the Act, the petitioners had the burden of proving their right to withhold the documents.[4] However, the petitioners resisted disclosure, claiming exemptions under the Act itself—(1) that the documents are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," § 552(b)(1), and (2) that they are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency [from which disclosure is sought]," § 552(b)(5).

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[2] On that day, this Court declined to enjoin the Cannikin test. *Committee for Nuclear Responsibility* v. *Schlesinger*, 404 U.S. 917. That litigation, featuring the release of several of the documents involved here, continues to bear upon this case. See *infra* at 26, 28, 31-32.

[3] A tenth document—the "impact statement" of the Atomic Energy Commission—has been publicly available at all pertinent times pursuant to the National Environmental Protection Act, 42 U.S.C. § 4321 *et seq.*

[4] The Act provides pertinently: "The court shall determine the matter de novo and the burden is on the agency to sustain its action." §552(a)(3).

The petitioners moved for summary judgment, relying solely upon an affidavit submitted by the petitioner Irwin. That affidavit asserted that all except one of the nine documents "involve . . . highly sensitive matter that is vital to our national defense and foreign policy," and that all of the disputed documents "were prepared solely for the purpose of giving advice to the President" (App. 29).

The Irwin affidavit did not purport to claim that each of the documents in question had been *specifically* kept secret by Executive order, as required by the statute. Nor did it purport to claim that any of the documents had been examined with a view to declassifying such portions as might not be required to be kept secret. To the contrary, the affidavit suggested that the documents had all been given one over-all classification under Executive Order 10501—an order, promulgated in 1953, that established a general secrecy classification scheme for all executive agencies.

Moreover, the Irwin affidavit suggested that at least some of the documents in question had been classified secret—not because of their own contents, but only because they were physically attached to *other* documents that had been so classified. That suggestion was confirmed by the subsequent admission of the petitioner Ruckelshaus, whose memorandum is one of the documents at issue here, that "nothing in [his] comment . . . needs to be stamped 'top secret,' " (App. 56), and by the Environmental Protection Agency's later declassification of that memorandum (Pet. Br. 6, n.5).

Nor did the Irwin affidavit purport to claim that each—or any—of the documents in dispute consisted solely of recommendations for the President, rather

than recommendations together with factual information.

The petitioners offered in evidence nothing besides the Irwin affidavit. Despite the deficiencies in their proof, the district court granted their motion for summary judgment on each of the two statutory grounds they had advanced (Pet. App. C.). The court did so without undertaking an adversary testing of the *ex parte* statements in the Irwin affidavit, and without examining any of the documents by itself.

Insofar as the respondents sought to maintain the action in their official capacities as Members of Congress, the district court dismissed the complaint on "separation of powers" grounds, and dismissed as moot the respondents' motion for summary judgment based on the statutory claim that the exemptions in the Act do not apply to them.[5]

The respondents took an expedited appeal (App. 53-55). The Court of Appeals for the District of Columbia Circuit reversed and remanded the matter to the district court for further consideration (Pet. App. A, B). The court of appeals did not pass upon all the questions argued to it (Pet. 29). Rather, that court "conclude[d] that summary disposition [of certain issues] is inappropriate," and that several issues argued by the parties "should be the subject of a full consideration on the merits by this court if the appeal is continued following the disposition on remand" Pet. 24). Thus, it did not reach the question whether the Freedom of Information Act confers any greater

[5] Section 552(c) provides pertinently: "This section [552, including the exemptions in subsection (b)], is not authority to withhold information from Congress."

rights to disclosure on Congressmen than it does on members of the public generally.[6] The court did not pass on the respondents' contention that the first exemption requires that each document sought to be withheld must be classified by a separate Executive order (Pet. 24).

The court of appeals did decide two narrow issues. The first related to the petitioners' claim under the first exemption. Here the court noted the inadequacies of the Irwin affidavit. It thought that a matter as important as one involving the first exemption should not be determined on the basis of the Irwin affidavit as it stood. It directed the district court to "take evidence on whether, and to what extent, the file [of withheld documents] contains documents that are now within the umbrella of a secret file but which would not have been independently classified as secret." On the same reasoning, it directed the trial court to determine whether "non-secret components [of documents] are separable from the secret remainder and may be read separately without distortion of meaning" (Pet. 27).

The second holding of the court of appeals directed similar treatment with respect to the petitioners' claim under the fifth exemption. Here the court noted that "the exemption protects the decisional processes of the President, or other policy-making executive officials" (Pet. 28). The court ruled that it would extend that protection to factual information wherever "it is inextricably intertwined with policy-making processes" (*ibid*). (footnote omitted).

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[6] Contrary to the petitioners' suggestion (Pet. Br. 7, n. 6), those issues *are* germane here, since their resolution in the respondents' favor by the Court would preclude a reversal of the judgment below. See *infra* at 53-59.

The court of appeals demonstrated its awareness of the sensitivity of the materials at issue. "In approaching this problem," it said, "we have in mind the very special place the President occupies in the conduct of foreign affairs, both traditionally and constitutionally, apart from his additional responsibilities in connection with the national defense." Commenting on the first exemption, the court noted:

> "In the exemption from disclosure contained in Section 522(b)(1) Congress has recognized the need for protection of the channels of communication and advice to the President in both these respects which are involved in the present litigation .... Moreover, although we have held in *Soucie* v. *David* [448 F.2d 1067] ... that the policy of the Act requires that the exemptions from disclosure prescribed by [the statute] ... be construed narrowly, this admonition must be tempered somewhat when the documents contain data supplied to the President with respect to nuclear explosions involving not only the national defense but the conduct of foreign affairs by the President in the context of such nuclear testing" (Pet. 28-29).

With respect to the fifth exemption, the Court observed that the district court

> will likewise have in mind, in possibly separating out factual data that can be disclosed without impinging on the policymaking decisional processes intended to be protected by this exemption, the sometimes delicate character of the responsibility of the President in the conduct of foreign affairs" (Pet. 29).

To avoid unwarranted disclosure of the disputed materials, the court of appeals ordered an *in camera* inspection of the documents by the trial court, "else

the possibility of *non-disclosure* under the guides . . . would be defeated" (Pet. 28) (emphasis supplied). Thus — contrary to the petitioners' suggestion — *in camera* inspection was ordered to protect the government from excessive disclosure. The court viewed the *in camera* process as a judicial restriction upon the traditional adversary process and upon public access to documents held by the government—a restriction adopted to implement the disclosure requirements of the Act without revealing any materials that the government might be entitled to withhold.

The petitioners applied for a writ of certiorari, and the Court granted review on March 6, 1972. 405 U.S. 974. Two days later, the President issued an Executive order that drained the case of importance and possibly rendered it unworthy of review. Executive Order 11652 established a new regime for the classification of national secrets. Indeed, it revoked Executive Order 10501, upon which the petitioners based their claim for review, and effectively adopted the rationale of the court below.[7]

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[7] In their brief in opposition to the petition for the writ, the respondents urged that the case did not raise the questions sought to be presented: that most of the documents in dispute had already been reviewed *in camera* by the trial court, the court of appeals, and this Court; that the case was not ripe for review; and that a remand to the trial court would be necessary in any event (Br. in Opp. 7-11). In addition to those points—which the respondents submit would justify dismissal of the writ as improvidently granted—the Government has now promulgated a new secrecy classification scheme that effectively moots the petitioners' case. See *infra* at 28, 32.

SUMMARY OF ARGUMENT

The Freedom of Information Act compels the disclosure of government information, subject only to narrowly defined statutory exemptions. The Act specifies—and the lower courts uniformly hold—that a government agency seeking to withhold documents requested under the Act must shoulder the burden of persuading a court in a *de novo* judicial proceeding that its refusal to disclose is justified. The petitioners have failed to meet that burden here. Their reliance on two of the statutory exemptions is misplaced.

1. The first exemption, relating to matters "specifically required by Executive order to be kept secret in the interest of national defense or foreign policy," does not permit the government to rest, without more, on a "secrecy" classification under Executive Order 10501.

Executive Order 10501 has no bearing on the first exemption. Neither the Act itself, nor its legislative history, shows that Congress intended that general Order to exempt documents from disclosure. To the contrary, it is generally assumed by leading commentators that the Act requires a specific order from the White House in respect to each requested document. K. C. Davis, *Administrative Law Treatise*, § 3A.16, at 143 (1970 Supp.). Even the petitioners concede that mere classification under Executive Order 10501 does not satisfy the Act, for they have abandoned the contention that "derivative classification" under the Order exempts documents from disclosure. Yet derivative classification—the practice of classifying all documents in accord with the documents they are physically attached to—is as much as part of Executive Order 10501 as the portions the petitioners would rely upon.

If that portion of the Order is irreconcilable with the Act, then the Order can hardly be the one Congress intended to incorporate.

Even if Executive Order 10501 were once part of the Act, it no longer is. The President has now issued Executive Order 11652, effective June 1, 1972, which explicitly revokes Executive Order 10501. The new order will not only govern future requests under the Act, but will determine the procedures to be followed on the remand ordered by the court below. Moreover, the new Order requires the government to perform the very portion-by-portion analysis that the court of appeals directed to take place *in camera*. To that extent, it not only codifies the procedure ordered by the court below but directly repudiates the petitioners' assertion that portion-by-portion classification "would create serious problems for the executive branch" (Pet. 10).

Finally, the portion-by-portion analysis ordered by the court below has already been followed in respect to some of the very documents involved in this case. The same district judge who was ordered to examine the nine disputed documents here has already examined six of them in a related litigation and released their nonsecret portions. He had no more difficulty separating the secret and nonsecret portions of those documents than the petitioners in separating secret documents from the nonsecret documents to which they were physically attached.

2. The fifth exemption, similarly, affords no basis for withholding the documents. The exemption protects "interagency or intra-agency memorandums" that would be available under the federal law of dis-

covery ("available by law to a party . . . in litigation with the agency"). Congress incorporated the exemption to protect the policy-making process within the executive branch. Rather than propose a hard and fast standard itself, Congress delegated to the federal courts the responsibility for adducing a workable standard on a case-by-case basis.

The federal courts have construed the exemption in light of their common law experience with agency memoranda. Accordingly, while exempting executive opinions and recommendations that reflect the policy-making process, they routinely disclose factual matter that has no adverse impact on the expression of policy. The court adapted that standard to the present case by ordering the disclosure of all facts not "inextricably bound" up with opinions and recommendations.

The petitioners have overstated the problem of separating facts from opinions. If the petitioners can show that the factual matter in these documents is "inextricably bound" up with expressions of policy, then it is already exempt under the order of the court below. But prior experience shows just the contrary. The same trial judge ordered to examine these documents already reviewed at least three of them in a related case, separated fact from opinion, and disclosed their factual portions to the public.

3. The court of appeals properly directed an *in camera* inspection of the disputed documents. Even if the petitioners were correct about the first and fifth exemptions, the government cannot rely on *ex parte* assertion to show that it has complied with them. The Act requires a *de novo* hearing with the burden on the government to justify nondisclosure. The government cannot satisfy that statutory burden by means of con-

clusory affidavits. It must, at the very least, submit its proof to the consideration of a neutral magistrate.

The respondents contended in the court below that the government should submit its proof to the normal adversary procedures. See *Alderman* v. *United States,* 394 U.S. 165 (1969). However, the court ordered an *in camera* inspection precisely for the purpose of protecting the government's interests in secrecy. Now the government would deprive the federal courts of any role at all in the administration of the Freedom of Information Act. Petitioners would foreclose *de novo* judicial review by the *ex parte* assertion that documents are immune from disclosure. They suggest that the courts cannot be entrusted to consider questions of national security. The Court rejected that argument last Term, *United States* v. *United States District Court,* — U.S. —, 41 U.S.L.W. 4761 (1972), and should do so again.

4. Whether or not the respondents are entitled to the relief below as members of the public, they have a special statutory right under the Act as Members of Congress. After setting forth the exemptions—including the two at issue here—that limit disclosure "to the public," Section 552(c) provides that "[t]his section is not authority to withhold information from Congress." Accordingly, Members of Congress who proceed in their official capacity have a right of disclosure free from the limits of the first and fifth exemptions.

The special statutory right of Members of Congress reflects their special needs for information. They cannot adequately perform their legislative tasks without commanding information within the executive branch. To complement their informal sources, they have pro-

vided a statutory remedy to obtain such information in a systematic fashion.

The district court wrongfully dismissed the suit below insofar as the respondents were suing as Members of Congress. It erred in holding that their suit raised nonjusticiable questions that the federal courts are incapable of resolving. The respondents do not assert a right that cannot be "judicially determined," or seek a remedy that cannot be "judicially molded." *Baker* v. *Carr,* 369 U.S. 186, 198. Nor do they ask the courts to decide an issue that the Constitution has committed to another branch of government. See *Gravel* v. *United States,* — U.S. — (Nos. 71-1017, 1026) (June 29, 1972); *Powell* v. *McCormack,* 395 U.S. 486 (1969). Instead, they seek relief under an Act of Congress insofar as it vests them with a special cause of action. In asking the federal courts to fashion standards, to apply them, and to provide relief, their suit in no way differs from private Freedom of Information Act suits.

ARGUMENT

Introduction

The Freedom of Information Act favors the disclosure of government information, and requires its production in all but a narrowly defined series of exemptions. Prior to the adoption of the Act in 1966, § 3 of the Administrative Procedure Act allowed the government to withhold information "in the public interest" or "for good cause found," and to require the person requesting information to show that he was "properly and directly concerned." 60 Stat. 238, 5 U.S.C. § 1002 (1964). Under the old law, agency and department heads enjoyed a "sort of personal ownership of news about their units . . . . H. Rep. No. 1497,

89th Cong. 2d Sess. at 2 (1966). Congressional hearings revealed widespread and extensive criticism of the law by members of the press and other concerned individuals. See Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee on S. 1666 and S. 1663, 88th Cong., 1st Sess. (1963).

As a result of that criticism, Congress passed the Freedom of Information Act, in the words of Chief Judge Friendly, to "increase significantly the public availability of agency records." *LaMorte* v. *Mansfield*, 438 F.2d 448, 451 (2d Cir. 1971). As the Court of Appeals for the Second Circuit has recently written:

> "The broad legislative intent behind the enactment of the Freedom of Information Act, as disclosed by the Report of the Senate Committee on the Judiciary and the Report of the House Committee on Government Operations, was to give the electorate greater access to information concerning the operations of the federal government. The ultimate purpose was to enable the public to have sufficient information in order to be able, through the electoral process, to make intelligent, informed choices with respect to the nature, scope, and procedure of federal governmental activities." *Frankel* v. *SEC*, — F.2d — slip. op. 2947, 2953-54 (2d Cir. May 4, 1972) (No. 71-2213) (footnotes omitted).

The petitioners concede that the Act "generally makes government records available for public inspection" (Pet. 9), and that the Act "was designed to make available to the public considerably more information than had previously been accessable" (Pet. Br. 14). As Mr. Justice Rehnquist—then Assistant Attorney General in the Office of Legal Counsel of the Justice

Department—recently testified before Congress, "The act is an epochal step in democratic government."[8]

The Act establishes a general rule of disclosure, enforced by a special judicial procedure. The statute provides pertinently that "each agency [of the Government], on request for identifiable records . . . *shall* make the records promptly available to any person." § 552(a)(3) (emphasis supplied). The Act specifies the means of judicial enforcement of its mandate:

> "On complaint, the district court . . . has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant. *In such a case the court shall determine the matter de novo and the burden is on the agency to sustain its action*" (*id.*) (emphasis supplied).[9]

The Act thus rejects the usual principle of deference to administrative determinations — first, by requiring a trial *de novo* in the district court; second, by shifting the burden of proof to the governmental de-

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[8] Hearings before a Subcommittee of the House Committee on Government Operations on U. S. Government Information Policies and Practices—Administration and Operation of the Freedom of Information Act (Part 4), at 1184 (March 10, 1972). (Hereafter cited as "Hearings").

[9] The importance attached by Congress to the judicial remedy is evidenced by its assignment of priority status to suits under the Act:

> "Except as to causes the court considers of greater importance, proceedings before the district court, as authorized by this paragraph, take precedence on the docket over all other causes and shall be assigned for hearing and trial at the earliest practicable date and expedited in every way." § 552(a)(3).

fendant. As the District Court for the Southern District of New York put it:

> "The purpose of the Act, seen in the statutory language and the legislative history, was to reverse the self-protective attitude of the agencies. . . . The Act made disclosure the general rule and permitted only information specifically exempted to be withheld; it required the agency to carry the burden of sustaining its decision to withhold information in a de novo equity proceeding in a disrtict court. Disclosure is thus the guiding star . . . in construing the Act." *Consumers Union* v. *Veterans Administration,* 301 F.Supp. 796, 799-800 (S.D.N.Y. 1969) (footnotes omitted), *appeal dismissed as moot,* 436 F.2d 1363 (2d Cir. 1971).[10]

The procedure of *de novo* judicial review applies as well to any agency claim that documents sought to be discovered come within one or more of the nine statutory exemptions to disclosure. Here, too, the agency has the burden of proof "as to whether the conditions of exemption in truth exist." *Epstein* v. *Resor,* 421 F.2d 930, 933 (9th Cir.), *cert. denied,* 398 U.S. 965 (1970).

The *de novo* judicial review is to be conducted in light of the statutory command of § 552(c) that the Act "does not authorize withholding of information

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[10] *Accord: Epstein* v. *Resor,* 296 F.Supp. 214, 216 (N.D. Cal. 1969), *aff'd,* 421 F.2d 930 (9th Cir.), *cert. denied,* 398 U.S. 965 (1970); *City of Concord* v. *Ambrose,* 333 F.Supp. 958 (N.D. Calif. 1971); *Nichols* v. *United States,* 329 F.Supp. 130, 133 (D. Kan. 1971); *Benson* v. *General Services Administration,* 289 F.Supp. 590, 591 (W.D. Wash. 1968), *aff'd,* 415 F.2d 878 (9th Cir. 1969); *Cooney* v. *Sun Shipbuilding & Drydock Co.,* 288 F.Supp. 708, 710 (E.D. Pa. 1968). *See also Sterling Drug Co.* v. *FTC,* 450 F.2d 698, 703 (D.C. Cir. 1971); *Soucie* v. *David,* 448 F.2d 1067, 1077 (D.C. Cir. 1971); *American Mail Line, Ltd.* v. *Gulick,* 411 F.2d 696, 702 (D.C. Cir. 1969).

or limit the availability of records to the public, except as *specifically* stated" in the statutory exemptions (emphasis supplied). The accompanying Senate report places a heavy burden on the government to justify nondisclosure:

> "The purpose of [§ 552(c)] is to make it clear beyond a doubt that all materials of the Government are to be made available to the public by publication or otherwise unless explicitly allowed to be kept secret by one of the exemptions in [§ 552 (b)] . . .
>
> "It is the purpose of the [Act] . . . to establish a general philosophy of full agency disclosure unless information is exempted under *clearly delineated statutory language* and to provide a court procedure by which citizens and the press may obtain information wrongfully withheld" S. Rep. No. 813, 89th Cong. 1st Sess. 3, 10 (1965) (emphasis supplied).[11]

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[11] "The Act [makes] . . . disclosure the general rule and [permits] . . . only information *specifically* exempted to be withheld." *Consumers Union*, 301 F.Supp., at 799-800 (footnote omitted) (emphasis supplied). "The policy of the Act requires that the . . . exemptions [be construed] narrowly." *Soucie* v. *David*, *supra* n. 10, at 1080; *cf. Getman* v. *NLRB*, 450 F.2d 670, 673-74 (D.C. Cir. 1971). "A broad construction of the exemptions would be contrary to the express language of the Act." *Wellford* v. *Hardin*, 444 F.2d 21, 25 (4th Cir. 1971); *cf. Bristol-Myers Co.* v. *FTC*, 424 F.2d 935, 938 (D.C. Cir. 1970).

A leading commentator on federal administrative practice and the Freedom of Information Act agrees that the general mandate of § 522(c) is to be accorded weight throughout the statute. Professor Kenneth Culp Davis has written that the "pull of the word 'specifically' [in subsection (c)] is toward emphasis on [the] statutory language" of the nine stated exemptions. The "specifically stated" clause in § 552(c), he notes, "is often relevant in determining the proper interpretation of particular exemptions. K. C. Davis, Administrative Law Treatise, § 3A.15, at 142 (1970 Supp.).

I. THE FIRST EXEMPTION DOES NOT IMMUNIZE ENTIRE DOCUMENTS SIMPLY BECAUSE THEY HAVE BEEN LABELED "SECRET."

The first exemption under the Act immunizes from disclosure matters "*specifically required by Executive order* to be kept secret in the interest of the national defense or foreign policy." § 552(b)(1) (emphasis supplied). That language was selected "to delimit . . . the exception and to give it a more precise definition." S. Rep. No. 813, *supra*, at 8.

The petitioners urge that the documents in dispute fall within the first exemption solely because they were once labeled "secret" under a general classification scheme promulgated nearly two decades ago. That scheme was established by Executive Order 10501, issued in November 1953. Under that order, certain Government materials could be labeled "confidential," "secret," or "top secret."

The petitioners' reliance on Executive Order 10501 is untenable for two reasons. First, that Order has nothing to do with the first exemption. Second, if the Executive Order did control the meaning of the exemption, it does so no longer: it has been replaced by a new Executive Order that effectively codifies the decision below.

A. Executive Order 10501 Has No Bearing on the First Exemption.

1. Neither the statute nor its legislative history shows that the exemption incorporates 10501.

The Freedom of Information Act makes no reference to Executive Order 10501. Neither does the Senate Report accompanying the bill that ultimately become law. The only pertinent document that so much as mentions Executive Order 10501 in connection with

the first exemption is the accompanying House Report. But that report did not adopt the suggestion imputed to it by the petitioners — that classification under Executive Order 10501 would, without more, entitle an agency to withhold records under the new law. Rather, the committee said:

> "[C]itizens both in and out of Government can agree to restrictions on categories of information which *the President has determined must be kept secret to* protect the national defense or to advance foreign policy, *such as* matters classified pursuant to Executive Order 10501." H. Rep. No. 1497, *supra,* at 9-10 (footnote omitted) (emphasis supplied).

The House Report refers to Executive Order 10501 merely to suggest the sorts of material that *the President,* under the new law, may properly determine to keep secret. The petitioners do not contend that the President has ever determined that any of the information sought by the respondents, or even the category of that information taken as a whole, "must be kept secret. . . ." Rather, the petitioners rely upon the fact that some officer of government — not known to the respondents and perhaps not even to the President — has made that determination.[12]

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[12] Despite their reliance upon extracts from the legislative debates and hearings preceding enactment of the bill, the petitioners nowhere point to any statement, whether by an advocate or an opponent of the Act, to the effect that Executive Order 10501, without more, satisfies the first exemption. Rather, Congressman Gallagher confirmed that "the bill in no way affects categories of information which *the President*—as stated in the committee report—has determined must be classified" (see Pet. Br. 19) (emphasis supplied). Congressman Moss's observation that the first exemption "recognizes" Executive Order 10501, and was drafted "in conformity" with it (*id.*), was made before a committee, not

2. Contemporaneous and scholarly interpretations of the Act show that the exemption does not embrace 10501.

Upon the adoption of the Act, the Department of Justice prepared a memorandum to establish a uniform agency policy on administrative interpretation and procedure under that new statute. That Memorandum "is the law in the sense that it guides the government's practices under the Act." K. C. Davis, *Administrative Law Treatise*, § 3A.1, at 115 (1970 Supp.). It provides further evidence that the petitioners cannot rely solely on Executive Order 10501. The Memorandum states:

> "[N]o great degree of specificity is contemplated in identifying matters subject to this [first] exemption. *However, in the interest of providing for the public as much information as possible, an Executive Order prepared for the signature of the President in this area should define as precisely as is feasible the categories of matters to be exempted.*" Dep't of Justice, Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act 30 (1967) (emphasis supplied).

By their own admission, the petitioners have failed to follow the route described in the memorandum. No Executive Order exists "in this area"; no Executive Order defines at all, let alone "as precisely as is feasible," the material sought by the respondents.

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in debate, and a year before final passage of the bill. And it means no more than what it says—that the first exemption was written with awareness of the general classification scheme, and that the two do not conflict. Both quotations are a far cry from the point, sought to be established by the petitioners, that a classification under Executive Order 10501, without more, immunizes an entire document from disclosure by virtue of the exemption.

The leading commentator on the Act has considered the interpretation to be accorded the first exemption without once suggesting that its scope is defined by Executive Order 10501. The view of Professor Davis is that where an agency seeks to resist disclosure under the exemption, the agency head must request—and obtain—a specific Executive Order directed to that request. "Under the Act." Professor Davis has written, "the Secretary would presumably ask the White House for an executive order, and a presidential assistant would presumably comply." Davis, *Administrative Law Treatise, supra,* § 3A.16, at 143.

Requiring a specific Executive Order for the withholding of material under the first exemption is neither burdensome nor unprecedented. During the first four years of the Act, government agencies have recorded only 30 denials of requests for information on the basis of the first exemption.[13] Moreover, precisely that requirement — voluntarily adopted by the President himself — is routinely followed when the government invokes "executive privilege" in withholding information from Congress.[14]

The requirement that requested documents be specifically classified by separate Executive Order before invocation of the first exemption also accords with the realities of classification. There are millions of documents within the executive branch now classified under Executive Order 10501. It is estimated, for example, that the Defense Department alone has over 20 million

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[13] See Hearings *supra,* n. 8, at 1342-43.

[14] The text of the President's Memorandum setting forth this policy is reproduced as Appendix B to this brief.

such documents or over a million cubic feet of secret papers—enough to equal 18 stacks of documents each as high as the Washington Monument. Hearings at 658, 685 (1971). There are some 150 million pages of paper still classified from World War II, and another 75 million from the Korean War. Hearings at 1012.

Some of those documents, and portions of them, would surely be declassified if the government had the resources to review them.[15] But the sheer volume of classified information overwhelms any such effort.[16] Indeed, Executive Order 10501 has not even provided for effective declassification.[17] The Freedom of Infor-

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[15] In a special project to review 240,000 selected World War II documents, for example, the Department of Defense determined in 1965 that over 100,000 should be declassified and that another 119,000 should be destroyed as non-record material. Hearings at 690.

[16] See Statement of David Cooke, Principal Deputy Assistant of Defense, in Hearings at 390,659.

The State Department estimated that it would take 24 clerks about a total of 10 years to declassify only a portion of its files:

> "For just one portion of our central foreign policy files, a portion containing about 5 million documents, we have estimated that a page-by-page review for declassification purposes would require the hiring of 24 additional clerks, and assuming the availability of countless man-hours of desk officer time, could be completed in about 10 years—while new mountains of classified paper would pile up in the interim."

Statement of William D. Blair, Jr., Deputy Assistant Secretary of State, Hearings at 1564 (daily transcript) (May 2, 1972).

[17] "[O]ur existing system of classification and declassification governed by Executive Order 10501, was not working as it should .... In addition, the automatic declassification provision of E.O. 10501 was virtually inoperative, since the language of the exceptions to it—particularly the definition of Group 3—was so broad

mation Act, on the other hand, addresses the problem of overclassification. It provides for the selective review of classified documents pinpointed by public request. Without such specific reexamination of requested documents, they would remain buried long after any need to keep them secret had elapsed. As William D. Blair, Jr., the Deputy Assistant Secretary of State, put it:

> "In practice, very few classified State Department documents were being assigned to Group 4 for automatic declassification after 12 years; instead, the effective declassification interval was currently 26 years . . . . Ahead of that 26-to-30-year gap, only a thin trickle of classified documents—a very small fraction of the total—was being reviewed and declassified on a page-by-page basis, in response to requests under the Freedom of Information Act, and other special circumstances." Hearings at 1565 (daily transcript) (May 2, 1972).

3. The petitioners' abandonment of "derivative classification" does not salvage their case.

Before the courts below, the petitioners claimed the first exemption for all but one of the disputed documents. In so doing, they conceded that several of those documents had not been *independently* classified "secret," but were labelled as such merely because they were attached to, or referred to, *other* documents that had been so classified. The petitioners sought to justify this "bunching of appendages," or "derivative classification," on the authority of a specific provision in

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as to allow almost any classified document to be excluded from automatic declassification, and this privilege was being widely used or abused." Hearings at 1564 (daily transcript) (May 2, 1972).

Executive Order 10501.[18] Section 3(b) of that Order provided:

> "*Physically Connected Documents.* The classification of a file or group of physically connected documents shall be at least as high as that of the most highly classified document therein. Documents separated from the file or group shall be handled in accordance with their individual defense classification."

The court of appeals properly rejected this "blanketing" approach.

> "This court sees no basis for withholding on security grounds a document that, although separately unclassified, is regarded secret merely because it has been incorporated into a secret file. To the extent that our position in this respect is inconsistent with the above-quoted paragraph of Section 3 of Executive Order 10501, we deem it required by the terms and purpose of the [Freedom of Information Act], enacted subsequently to the Executive Order" (Pet. 26).

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[18] The issue of "derivative classification," suggested by the wording of the Irwin affidavit in the district court, surfaced dramatically on appeal when one of the petitioners admitted that at least one of the documents at issue had been labelled "secret" simply because it related to separately classified documents. On August 31, 1971, following the trial court's decision and while the case was before the court of appeals, the petitioner Ruckelshaus was asked by newspaper reporters to comment on the secrecy classification of his report to the petitioner Irwin. Mr. Ruckelshaus replied:

> "The document I received [from Mr. Irwin for comment] was marked 'top secret.' I was informed my comment should be 'top secret.' There was nothing in my comment that needs to be stamped 'top secret'" (App. 58).

Subsequently, the petitioners now advise the Court, the Environmental Protection Agency declassified Mr. Ruckelshaus's letter (Pet. Br. 6, n.5).

The petitioners now recognize that the principle of "derivative classification" embedded in Executive Order 10501 cannot be reconciled with the Act. Indeed, they confess that at least one of the disputed documents was classified "Top Secret" and "Restricted Data," not because of anything *it* contained, but "only because it was to be attached to" *another* document (Pet. Br. 6, n.5). Accordingly, the petitioners "do not rely upon Exemption 1 of the Act as a ground for nondisclosure" of that document (*id.*). And they accept the holding of the court below that a document attached to a classified file, but not independently classified, cannot be withheld merely because it has been incorporated into a secret file (Pet. Br. 8).

Nonetheless, the petitioners continue to press their attack on the correlative holding of the court below that entire documents do not become immune under the Act simply because they have been accorded one over-all classification as a result of a necessity to withhold certain portions. That single over-all classification was also prescribed by Executive Order 10501. Section 3(c) provided:

> "*Multiple Classification.* A document, product, or substance shall bear a classification at least as high as that of its highest classified component. The document, product, or substance shall bear only one over-all classification, *notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications*" (emphasis supplied).

The court of appeals similarly rejected blanket reliance on this "internal classification" rule. It said:

> "The same reasoning applies to this provision as to the one dealing with physically-connected doc-

uments. Secrecy by association is not favored. If the non-secret components are separable from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed" (Pet. 27).

According to the petitioners, this holding — unlike the one relating to "derivative classification" — is infeasible, creates problems for the executive branch, and unduly injects the courts into an area reserved for executive discretion.

The petitioners' effort to amputate the more egregious aspects of Executive Order 10501 cannot succeed. The petitioners confess that the rule of "derivative classification" conflicts with the Congressional policy of disclosure mandated by the Act. But that rule is as much a part of Executive Order 10501 as the rule imposing a single classification on a given document (see Pet. 4). There is no textual basis, in either the statute or the executive order, for the distinction the petitioners now seek to draw. By their efforts to extricate themselves from the indefensible portions of Executive Order 10501, the petitioners effectively concede that that Order cannot be the type of executive order referred to in the statute.

Similarly, there is no basis in policy for the distinction the petitioners attempt to make. A single document may be as easily severable into secret and non-secret components as two documents stapled to one another — as, in fact, is demonstrated by the documents involved in this very case. For the same district judge who refused to look at the nine disputed documents in this case on August 27, 1971, subsequently looked at all but three of them two months later. In *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, — F.2d

— (D.C. Cir. Oct. 28, 1971) (No. 71-1854), the district court ordered the government to submit six of the nine documents here at issue for his personal *in camera* inspection.[19] Upon the government's interlocutory appeal, the court of appeals rejected the contion that an invocation of "executive privilege" precludes an *in camera* screening of the documents by the district court. — F.2d, at —, slip. op., at 3.

The court of appeals provided for a review and stay of its order by this Court, if the government should request it. No applications to that effect were ever made, and the time to seek certiorari has long since expired.[20] The district court performed the *in camera* inspection that the government now says will "create serious problems" (Pet. 10), and released to the public portions of the documents at issue here.[21] The documents were before the court of appeals, and before this Court, on the hearing of the *Nuclear Responsibility* plaintiffs' motion for an injunction.[22] An examination of those documents reveals that the district court — with no apparent difficulty — released not only

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[19] Of the various documents referred to by Mr. Irwin in Paragraph 5 of his affidavit (App. 28-29), the only three not fully reviewed *in camera* in *Nuclear Responsibility* appear to have been Items A, B and B2. See Appendix C in this Brief.

[20] That this decision not to seek review was a deliberate one is established by the statements of the Solicitor General before this Court on the oral argument of *Nuclear Resonsibility*, 404 U.S. 917, *denying injunction* in — F.2d — (D.C. Cir. Nov. 3, 1971) (Nos. 71-1869 & Misc. 3717). See Transcript of Oral Argument in 404 U.S. 917 at 50-51.

[21] See Pet. Br. 5-6, nn.2-4. Not surprisingly, the petitioners "do not seek relief" with respect to the impending *in camera* inspection of documents already inspected and released to the public (*id.*, n. 2).

[22] See Transcript, *supra* n. 20, at 15-16, 26.

materials previously classified as secret solely on the basis of the annexation to other, separately classified documents, but portions of separately classified matter as well.[23]

B. Executive Order 10501 Has Been Revoked, and Replaced by a New Classification Scheme That Codifies the Decision Below.

Although the petitioners relegate the matter to a footnote in their brief (Pet. Br. 18, n. 13), the government has promulgated a new executive order to

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[23] The documents disclosed in *Nuclear Responsibility* have been lodged with the Clerk of the Court. One of the documents declassified by excision of certain words and figures is reprinted in part as Appendix D to this brief.

Further evidence that classification under Executive Order 10501 cannot, by itself, satisfy the first exemption is afforded by the involvement of Atomic Energy Act materials. In his affidavit before the district court, the petitioner Irwin relied not only on the "secrecy" classification under Executive Order 10501, but on a "Restricted Data" classification imposed under the Atomic Energy Act, 42 U.S.C. §§ 2014(Y), 2161, 2162 (see App. 28-29). The petitioners are now silent about the latter classification. That silence is not surprising. By no stretch of interpretive ingenuity can the Energy Act be deemed an "executive order" required by the first exemption. Thus, a document classified only under the Energy Act may be withheld under the first exemption only on the basis of an executive order "specifically" requiring its nondisclosure. Yet, the petitioners urge that the same document, classified in the same manner under Executive Order 10501, may be withheld without more. It is incongruous to suggest that Congress would have afforded greater latitude to the withholding of documents classified under a pre-existing executive order than under one of its own statutes. Surely, if Congress had intended, as the petitioners urge, that the first exemption is satisfied by a classification under Executive Order 10501, without more, it would have provided similar treatment for classification under laws such as the Energy Act. The fact that Congress did not do so further shows that Executive Order 10501 cannot have the significance that the petitioners would attribute to it.

regulate the system of secrecy classification. Executive Order 11652 was issued on March 8, 1972, two days after the Court granted review in this case.[24] The new Order expressly revokes Executive Order 10501 and declares the old Order to be superseded as of June 1, 1972. (Resp. Br. App. A, p. 1a).

The new Order explicitly recognizes the Freedom of Information Act. In its preamble, it recites:

> "The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current information policies of the executive branch" (Resp. Br. App. A, p. 1a).[25]

In addition to its repeal of the old Executive Order 10501, Executive Order 11652 provides the exclusive authority for the withholding documents under the first exemption of the Act. The Order notes the existence of "some official information and material which, because it bears directly on the effectiveness of our national defense and the conduct of our foreign relations, must be subject to some constraints for the security of our Nation and the safety of our people and our allies" (*id.*). The Order specifies: *"This*

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[24] The text of Executive Order 11652 is reprinted in its entirety as Appendix A to this brief.

[25] In his statement accompanying the promulgation of Executive Order 11652, the President said:

> "The Executive order I have signed today is based upon . . . a reexamination of the rationale underlying the Freedom of Information Act." 8 Presidential Documents 542 (Mar. 13, 1972.

official information or material, referred to as classified information or material *in this order,* is expressly exempted from public disclosure by Section 552(b)(1) of Title 5, United States Code" (*id.*) (emphasis supplied).

Further, Executive Order 11652 requires the government to perform the very portion-by-portion analysis that the court below directed take place *in camera.* The order thus contradicts the petitioners assertion that the portion-by-portion examination called for below is infeasible and "would create serious problems for the executive branch" (Pet. 10). Section 4(a) of the Order provides pertinently:

> "*Documents in General.* . . . Each classified document shall . . . to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use."

In his statement accompanying the new Order, the President expressed his dissatisfaction with overclassification under the old order:

> "A major course of unnecessary classification under the old Executive order was the practical impossibility of discerning which *portions* of a classified document actually required classification. Incorporation of any material from a classified paper into another document usually resulted in the classification of the new document, and *innocuous portions of neither paper could be released.*
>
> "To the extent practicable, each classified document under the new system will be marked to show which portions are classified, at what level, and which portions are unclassified." 8 Presidential Documents 544 (Mar. 13, 1972) (emphasis supplied).

Thus, the new classification scheme — which the petitioners have not discussed in their brief, but which will control the case upon the court of appeals' remand to the district court—corroborates the wisdom of the judgment below. The executive branch has itself effectively ratified the very judicial decision that the petitioners here say is unacceptable.

It is undisputed that none of the documents at issue has been appraised in light of Executive Order 11652. That Order requires portion-by-portion classification to facilitate excerpting. No such process has ever taken place here. Nor do the petitioners intimate that they are willing to perform it.

The separation of "secret" from "nonsecret" components ordered by the court of appeals would not pose the problems alluded to by the petitioners. As a practical matter, this distinction can often easily be made by the classifying agency itself. A prime example of such portion-by-portion declassification occurred in *Nuclear Responsibility* when a "secret" AEC evaluation report was submitted to the district court. Prior to submission, the AEC excised the "secret" components, declassified the rest, and ultimately the declassified report was released to the public. Portions of that declassified report are reprinted as Appendix D to this brief.[26] Examination of those sections readily demonstrates how simple it is in fact to declassify certain documents by excision of limited amounts of material. That report apparently was declassified simply by excising all direct and indirect references to the yield of the Amchitka test. Such material constituted a minimal part of the entire report.

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[26] The entire report has been filed with the Clerk.

Petitioners misconstrue the decision below as requiring judicial declassification. No such procedure is necessarily contemplated. Indeed it is quite possible that the district court's sole responsibility will be to ensure that the *executive* goes through each document on a portion-by-portion basis, as was the case in *Nuclear Responsibility,* and as is now required under Executive Order 11652. Thus the role of the courts may simply be to see that the executive does its job in light of the Act's general requirement of disclosure.[27]

II. THE FIFTH EXEMPTION DOES NOT IMMUNIZE ENTIRE DOCUMENTS SIMPLY BECAUSE THEY ARE CALLED "ADVISORY."

The petitioners also contend that all of the documents at issue are entirely exempt by virtue of the fifth exemption. That exemption immunizes "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," 5 U.S.C. § 552(b)(5).

As the sole support for their claim to the fifth exemption before the district court, the petitioners relied on the statement in Mr. Irwin's affidavit that the agency reports at issue "were prepared solely for the purpose of giving advice to the President . . . and used solely for transmittal to the President as advice and recommendations" (App. 29).[28] In the court of ap-

[27] Precisely this sort of judicial supervision occurred in *Nuclear Responsibility* where the district court examined documents *in camera* with the *ex parte* assistance of technical advisors supplied by the government. Working with those advisors, the district court released portions of the *in camera* materials.

[28] The petitioners supplemented that statement with references to descriptive passages about the Under Secretaries Committee appearing in two reports by the President to the Congress.

peals, they continued to rest upon the assertion that the materials sought by the respondents were "advisory," rather than factual, in nature.

In this Court, the petitioners urge a different theory of the fifth exemption—that the exemption covers not only recommendations or opinions, but also factual information. That distinction between fact and opinion was drawn by the court below and by all the other courts that have considered the question. Further, the petitioners contend, the legislative history establishes that Congress refused to draw such a line—an argument not advanced before the court of appeals.

Apart from the fact that petitioners did not present this theory to the court of appeals, they err in their reading of both the fifth exemption and its history. The language of that exemption directly incorporates the fact-opinion distinction. It does so by limiting the statutory immunity to materials "not available by law to a party . . . in litigation with the agency" resisting disclosure. As the House Report confirms, this language means that the public is entitled to all internal memoranda that a private party could discover in litigation with the agency. H. Rep. No. 1497, *supra,* at 10.

A. The Exemption Is Limited to the Protection of the Executive Policy-Making Process.

The fifth exemption, like its companions, is subject to the overriding requirement of § 552(c) that materials not be withheld except as "specifically" authorized by the Act. The provision "encourages the free exchange of ideas among Government policymakers, but it does not authorize an agency to throw a protective blanket over all information by casting it in the form

of an internal memorandum." *Wellford* v. *Hardin*, 330 F.Supp. 915, 917 (D. Md. 1971). See also *Soucie* v. *David, supra*, at 1077; Attorney General's Memorandum, *supra*, at 35. The provision protects the agencies from having to "operate in a fishbowl," S. Rep. No. 1497, *supra*, at 10; "but by the same token [seekers of information] . . . should [not] be required to operate in a darkroom." *American Mail Line* v. *Gulick, supra*, at 703.

B. The Statutory Language, Legislative History, and Judicial Precedent All Establish That the Policy of the Exemption Is Served by the Fact-Opinion Distinction.

1. The language of the exemption incorporates the fact-opinion distinction long established in federal discovery.

Under the fifth exemption, inquiry focuses on whether the documents sought would be "available by law to a party other than an agency in litigation with the agency." § 552(b)(5). The accompanying House report interprets this language to mean that "any internal memorandum which would routinely be disclosed to a private party through the discovery process in litigation with the agency would be available to the general public." H.R. Rep. No. 1497, *supra*, at 10.[29]

[29] The word "routinely" does not appear in the statute. The petitioners rely upon the House Committee's attempted insertion of the word "routinely" to argue that even if the documents sought might otherwise be available in civil litigation, they would not be "routinely" available. The authorities agree that that Report cannot be relied upon as an expression of Congressional will where it conflicts with its Senate counterpart. The one court of appeals, the two district courts and the one commentator who have considered the question all agree that where the Senate and House reports disagree, the Senate report is to be preferred as a reliable indicator of the legislative intent. Since the House report was not published until after the Senate had already passed the bill, only the Senate report was considered by both Houses of

The courts and commentators uniformly agree that the issue posed by the statutory language is whether "'a private party'—not necessarily the applicant—would routinely be entitled to [disclosure of disputed materials] through discovery." Davis, *supra*, § 3A.15, at 158; *Sterling Drug, supra*, at 705; *General Services Administration* v. *Benson*, 415 F.2d at 880; *Tennessean Newspapers, Inc.* v. *Federal Housing Administration*, — F.2d —, slip op. at 5 (6th Cir. May 4, 1972) (No. 71-1676), *aff'g.* 341 F. Supp. 1013, 1014 (M.D. Tenn. 1971); *Consumers Union*, 301 F. Supp., at 805. "Since the . . . Act exempts only records 'not availaible to a party other than an agency,' it does not limit the actions used to test the exemption to ones in which the person seeking the documents is or might be involved. . . . The fulcrum of this test is discovery practices as regulated by the courts. . . ." *Consumers Union, supra.* Under this approach, the agency resisting disclosure in a suit brought under the Act must show that "in the normal sort of action in which the documents might be of value, courts would not order the documents produced. At this point, the burden would shift to the plaintiff at least to come forward with a theory of an action in which a court would order the documents produced." *Benson* v. *General Services Administration*, 289 F.Supp., at 595.

Congress. *Getman* v. *NLRB, supra*, at 673, n.8; *Soucie* v. *David, supra*, at 1077 n.39; *Benson* v. *General Services Administration, supra*, 289 F.Supp. at 595; *Consumers Union, supra*, 301 F.Supp., at 801; Davis, *supra*, §§ 3A.2, at 116-17 & 3A.31, at 174-76.

In any event, the petitioners overlook that some of the very documents at issue here were disclosed to the plaintiffs in the *Nuclear Responsibility* case—and were disclosed "routinely" in the sense that, pursuant to traditional rules of discovery, the plaintiffs became entitled to see them upon a showing of good cause and particularized need.

Discovery practice in the federal courts has generated many decisions that make available internal memoranda of government agencies by separating fact from opinion. Those pre-Act decisions are now codified by the fifth exemption. They uniformly recognize the "obvious distinction, in terms of necessity of inspection, between documents ['composed wholly of opinions, recommendations and deliberations'] . . . and those which contain facts." *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 40 F.R.D. 318, 327 (D.D.C. 1966), *aff'd on opinion below,* 384 F.2d 979 (D.C. Cir.), *cert. denied,* 389 U.S. 952 (1967). *Accord: Machin* v. *Zuckert,* 316 F.2d 336, 340-41 (D.C. Cir.), *cert. denied,* 375 U.S. 896 (1963); *Boeing Airplane Co.* v. *Coggshall,* 280 F.2d 654, 662 (D.C. Cir. 1960). See also *Reliable Transf. Co.* v. *United States,* 53 F.R.D. 24, 25 (E.D.N.Y.) (1971); 4 J. Moore's Federal Practice ¶ 26.61[7], at 26-331 (2d ed. 1971).

Under Rule 26 of the Federal Rules of Civil Procedure,[30] a privilege is generally recognized apart from the Act for "intra- and inter-agency advisory opinions and recommendations submitted for consideration in the performance of decision- and policy-making functions." *Freeman* v. *Seligson,* 405 F.2d 1326, 1339 (D.C. Cir. 1968); *Accord: Wood* v. *Brier,* 54 F.R.D. 7, 12 (E.D. Wis. 1972). See also *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena, supra,* at 324; *Olsen* v. *Camp,* 328 F.Supp. 728, 731 (E.D. Mich. 1970); *Rosee* v. *Bd. of Trade,* 36 F.R.D. 684, 689 (N.D. Ill 1965). But if "there is a need for discovery to preclude prejudice and unfairness, . . . a conditional executive privilege

[30] Rule 26(b)(1) provides pertinently: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. . . ."

cannot stand in the way of necessary discovery." *Olsen Rug Co.* v. *NLRB,* 291 F.2d 655, 662 (7th Cir. 1961). *Accord: Wood* v. *Brier, supra.* Accordingly, the Government's conditional privilege with regard to advisory opinions does not extend to factual reports and summaries. *McFadden* v. *Avco Corp.,* 278 F.Supp. 57 (M.D. Ala. 1967); *Wood* v. *Brier, supra.*

In sum, "[t]he courts have . . . been dealing with this problem since long before the Freedom of Information Act was passed, and they can bring to the administration of the exemptions of that statute the common sense by which they have had to measure claims of executive privilege." *Ackerly* v. *Ley,* 420 F.2d 1336, 1341 (D.C. Cir. 1969). The Fifth exemption was intended to incorporate that fund of judicial common sense. It preserves and carries forward the careful process of examination—agency-by-agency, case-by-case, and even document-by-document—to ensure consideration of the particular interests at stake.

2. The legislative history of the Act fully supports the fact-opinion distinction.

The legislative history shows that Congress intended to differentiate materials that are "part of the deliberate process of the agency" from those that are "factual in substance." *Consumers Union,* 301 F.Supp., at 805. The statutory phrase "which would not be available by law to a party other than an agency in litigation with the agency" was substituted on the recommendation of the Senate Judiciary Committee for an earlier, murkier phrase—"dealing solely with matters of law or policy." S. Rep. No. 813, *supra,* at 1-2. In explaining the old language, the Committee had said in an earlier report that "All *factual* material in Government records is to be made available to the public.

. . ." S. Rep. No. 1219, 88th Cong. 2d Sess. 7 (1964). The substituted language refined the policy-versus-fact distinction so that the distinction would be established in the discovery test now explicitly laid down by the statute. "It is at least clear, in light of the strong Congressional drive to promote disclosure, that the amendment was not intended to place 'factual material' within the coverage of the fifth exemption." *Consumers Union,* 301 F.Supp., at 805.[31]

The House and Senate reports accompanying the bill as finally enacted show that Congress contemplated an exemption carefully tailored to protect agency opinions and recommendations—in the words of the House report, "advice from staff assistants and the exchange of ideas among agency personnel," H.R. Rep. No. 1497, *supra;* and in those of the Senate counterpart, "frank discussion of legal or policy matters in writ-

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[31] In this connection, the petitioners argue (Pet. Br. 32-38) that the language ultimately adopted was selected "in response" to criticism from various government agencies that the phraseology of preceding bills was unduly narrow in failing to exempt factual as well as policy statements. But nothing in the history discussed by the petitioners supports the proposition that the shift in language was prompted by the stimulus they cite rather than by the intention to ensure the availability of factual material. In any event, as Professor Davis has noted,

> "Even though the records of the various hearings over a ten year period are voluminous, probably more than ninety-five per cent of the useful legislative history is found in a ten page Senate Committee report and in a fourteen page House Committee report. . . . Committee reports not addressed to the enacted version of the bill do not show the intent of Congress in enacting the statute. They show what the intent of Congress would have been if it had enacted the bill it did not enact." Davis, *supra,* §§ 3A.2, at 116, 3A.19, at 150 (footnotes omitted), quoted approvingly in *Frankel* v. *SEC,* — F.2d —, slip op. at 2958 (2d Cir. May 4, 1972) (Oakes, J., dissenting).

ing," S. Rep. No. 813, *supra,* at 9 (1965). The disclosure of factual material is entirely consistent with the purposes set forth by the committees; it does not compromise the rendering of advice and the expression of opinion.

3. The courts agree that facts must be disclosed.

In construing the fifth exemption, the lower courts have consistently followed the fact-opinion distinction. They have uniformly held that the provision protects "internal communications consisting of advice, recommendations, opinions, and other materials reflecting deliberative or policy-making processes, but not purely factual or investigatory reports." *Soucie* v. *David, supra* (footnote omitted); *Accord: Grumman Aircraft Eng. Corp.* v. *Renegotiation Bd.,* 425 F.2d 578, 582 (D.C.Cir. 1970); *Bristol-Myers, Co., supra,* at 939; *General Services Administration* v. *Benson,* 415 F.2d, at 880. See H.Rep. No. 1497, *supra,* at 10; S. Rep. No. 813, *supra,* at 9; *Long Island R.R. Co.* v. *United States,* 318 F.Supp. 490, 499 n.9 (E.D.N.Y. 1970) (three-judge court) (per Friendly, J.); *Consumers Union,* 301 F.Supp. at 805. The exemption embodies "the privilege, customarily enjoyed by the Government in its litigations, against having to reveal those internal working papers in which opinions are expressed and policies formulated and recommended." *International Paper Co.* v. *FPC,* 438 F.2d 1349, 1359 (2d Cir.), *cert. denied,* 404 U.S. 827 (1971); *Ackerly* v. *Ley, supra,* at 1341. The documents are exempt if they "express an exchange of ideas between agencies or their respective staff members," and if the "administrative policy-making process [is] exhibited. . . ." *M. A. Schapiro & Co.* v. *SEC,* 339 F.Supp. 467, 470 (D.D.C. 1972). Policy- and theory-oriented documents

are privileged under the Act; mere factual data are subject to production *Talbott Const. Co.* v. *United States,* 49 F.R.D. 68, 71 (E.D. Ky. 1971).

As the court below has recently said—in a case involving some of the documents here at issue, but in which the government chose not to seek this Court's review—the distinction lies between "those documents or portions of documents that set forth facts [and] . . . those that present comments that must be held confidential in order to maintain the integrity of the executive decision-making process." *Nuclear Responsibility, supra,* slip op. at 6 (emphasis supplied).

C. The Petitioners Cannot Successfully Contend That Facts Are Inseparable From Opinions.

The petitioners argue that "the distinction . . . between factual matters and matters related to the 'policymaking process,' is highly unrealistic, for the selection and presentation of factual background bearing on a particular decision is virtually certain to be 'inextricably bound' with the decision-making process" (Pet. 17). That contention overlooks the holding of the court below—that facts are exempt from disclosure wherever they are "inextricably intertwined" with the policymaking process.

The petitioners' contention also ignores the realities of this case—that the district judge who has already examined the documents made just the distinction between fact and opinion that the petitioners say cannot be done. In the *Nuclear Responsibility* case, the trial court examined a large number of materials and then released to the public portions of at least three documents—documents that the petitioners continue to claim are entirely "advisory" (Pet. Br. 5-6 nn. 2-4).

A particularly dramatic illustration occurred in the case of the memorandum of the Council on Environmental Quality. In an affidavit filed in the *Nuclear Responsibility* case, petitioner Train asserted, with respect both to that memorandum and other papers:

> "I have determined that it would be injurious to the proper performance of the Council's statutory responsibilities as an advisor to the President to disclose the documents or their contents. . . ."

Nonetheless, the district court directed the release of all but two portions of the memorandum following an *in camera* inspection of the document. The released portions of that memorandum have been reprinted as an appendix to the respondents' brief in opposition to the petition for a writ of certiorari. Those portions speak for themselves. They reveal the solely factual nature of the material disclosed.

III. THE COURT OF APPEALS PROPERLY DIRECTED AN IN CAMERA INSPECTION OF THE DISPUTED DOCUMENTS

The petitioners assert that the materials in dispute are entirely exempt under the Act, both because they have been classified "pursuant to Executive Order 10501" (Pet. 11) and because they are "entirely advisory in nature" (*id.* 18, n. 11). For the reasons set forth above, that assertion is untenable because it rests on an erroneous interpretation of each of the two exemptions at issue. Moreover, the petitioners' characterizations of the documents have never been tested in a judicial proceeding. Rather, the petitioners have offered only the unilateral assertion that they are entitled to withhold the disputed documents under one or both of the exemptions.

The petitioners cannot thereby have satisfied the requirements of the Freedom of Information Act. The express statutory language, it will be recalled, stipulates that upon the filing of a complaint, the federal district court "shall determine the matter de novo and the burden is on the agency to sustain its action." § 552(a)(3). In accordance with the statutory mandate, the court of appeals in this case could have found that the evidence the petitioners had adduced in support of their claimed right to withhold the documents failed to carry their burden, and that the documents should be released in their entirety.

Instead, as a protection to the Government, and to guard against the possibility of undue disclosure, the Court declined to act on the merits of the litigation on the basis of the evidence proffered by the petitioners. The court remanded the matter to the trial court to give the petitioners a second chance to prove their case. And, as a *further* protection to the Government, the court directed an *in camera* inspection of the disputed materials.

To be sure, the process of *in camera* inspection, as ordered by the court of appeals, departs from the normal course of civil litigation. As this Court had occasion to say in the criminal context in *Alderman* v. *United States,* 394 U.S. 165, 183-84 (1969):

> "Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice in a given case is nowhere more evident than in those cases, such as the ones at bar, where an issue must be decided on the basis of a large volume of factual materials, and after consideration of the many and subtle interrelationships which may exist among the facts reflected by these records. As the need for adver-

sary inquiry is increased by the complexity of the issues presented for adjudication, and by the consequent inadequacy of *ex parte* procedures as a means for their accurate resolution, the displacement of well-informed advocacy necessarily becomes less justifiable.

"Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time or unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands."[32]

The *in camera* practice is acceptable only in limited circumstances, where the traditional adversary process poses clearly defined and unacceptable hazards.[33] It necessarily "short-circuits the adversary process"; one party must operate in the dark, lacking knowledge of the contents of the documents held by the other side necessary to question whatever *ex parte* assertions its adversary may have made. *Sterling Drug, supra,* at 715 (concurring and dissenting opinion).

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[32] As recently as last Term, and despite the urgings of the Government, this Court pointedly declined to re-examine "the basis and scope" of *Alderman's* confirmation of the preference for adversary proceedings in our system of justice. *United States* v. *United States District Court,* — U.S. —, n. 21, 41 U.S.L.W. 4761, 4769 n. 21 (1972).

[33] See *Wood* v. *Brier, supra,* at 9, n. 5 (undertaking *in camera* inspection only where neither party objected).

A. Within Properly Drawn Limits, in Camera Inspection Is an Appropriate Procedure—Generally, Under the Act, and on the Facts of This Case.

1. The courts have already looked at documents involved in this case and have directed public disclosure of substantial portions.

The petitioners would foreclose not only the traditional adversary system, but even an *ex parte* judicial determination whether they are entitled to the claimed exemptions. No court has ever independently concluded, on the basis of its own examination of the documents, that those documents in fact have been classified "pursuant to" Executive Order 10501, or are "entirely advisory." To the contrary, to the extent that the courts have looked at the documents—and the judges of three courts, including this one, have presumably done so in the *Nuclear Responsibility* litigation—they have made the opposite determination. District Judge Hart, in an action left undisturbed both by the court below and by this Court, directed the release of significant portions of the documents. Presumably he would not have done so if he had believed that those portions disclosed either properly classified secrets or agency opinions entitled to be held in confidence.

2. In camera inspection is accepted in litigation generally.

The government has not objected to *in camera* inspections of "secret" materials by trial and appellate courts and by this Court—in cases where *it* has applied for judicial review. See, *e.g., New York Times Co.* v. *United States,* 403 U.S. 713, *aff'g United States* v. *Washington Post Co.,* 446 F. 2d 1327, 1328 (D.C. Cir.) and *rev'g United States* v. *New York Times Co.,* 444 F. 2d 544 (2d Cir.), *rev'g* 328 F. Supp. 324, 326 (S.D. N.Y. (1971)). To the contrary, the Solicitor General

urged this Court not long ago to resolve conflicts between the litigant's right to information and the government's need for secrecy by subjecting disputed materials to *in camera* inspection:

> "It is . . . familiar doctrine that when there is some recognized interest militating against unnecessary public disclosure of information which a litigant is seeking to discovery, it is appropriate to submit the material to the district judge for *in camera* examination so that he may determine whether disclosure should be ordered." [34]

The government again advanced this argument at the last Term of Court. In its brief in *United States* v. *United States District Court*, — U.S. —, 41 U.S.L.W. 4761 (1972), the government said:

> "When interceptions are made for national security purposes, the reasons are especially strong for permitting courts to determine *in camera* whether the information obtained thereby is arguably relevant to a prosecution before turning the material over to a defendant; and courts should be permitted to make an initial determination *in camera* with respect to these interceptions." Brief for the United States, at 36.

This Court has frequently provided for *in camera* inspection of documents over which the government and private litigants have conflicting claims. See *Taglianetti* v. *United States*, 394 U.S. 316 (1969) (electronic surveillance); *Dennis* v. *United States*, 384 U.S. 855, 874-75 (1966) (disclosure of grand jury minutes subject to *in camera* deletion of "extraneous

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[34] *Kolod* v. *United States*, 390 U.S. 136, Memorandum of the United States on Motion to Amend Order of Jan. 28, 1968, at 8, modified *sub nom. Alderman* v. *United States*, *supra*.

material"); *Campbell* v. *United States,* 365 U.S. 85, 95 (1961) (Jencks Act statements); *Palermo* v. *United States,* 360 U.S. 343, 354 (1959) (same); *Roviaro* v. *United States,* 353 U.S. 53 (1957) (disclosure of informant's identity); see also *United States* v. *Reynolds,* 345 U.S. 1, 10 (1953).

3. The in camera proceeding is one of the tools available to the judiciary under the Act.

The court below has not insisted upon an *in camera* inspection in every Freedom of Information Act case. "[T]he court need not inspect the [disputed document]," the court of appeals has said, "if the Government describes its relevant features sufficiently to satisfy the court that the claim of privilege is justified." *Soucie* v. *David, supra,* at 1080 (footnote omitted). Because the Act requires a *de novo* determination of the government's decision to withhold requested documents, and places the burden of persuasion on the government, a judicial determination does require the agency opposing discovery to submit detailed evidence supporting its asserted right to withhold the documents. "Although proof may be made by affidavits, a bare statement that the documents are within the exemption is insufficient." *Sterling Drug, supra,* at 714-15, (concurring and dissenting opinion). Testimony before the trial court by the individuals who prepared the documents may be required before the court can decide the applicability of the statutory exemptions. In certain cases, it may be necessary to produce the documents themselves for examination by the parties under an appropriate protective order prohibiting disclosure to the general public or other unauthorized use. In any event, the trial court must take all possible procedural steps to obtain the maximum

amount of evidence concerning the true nature of the requested materials.

In this case the trial court took none of the above steps. It was prevailed upon by the petitioners to grant summary judgment on the basis of a conclusory, inadequate affidavit—an affidavit that on its face advanced some claims to "secrecy" that the petitioners now abandon. The proceeding in the trial court surely was not the *de novo* hearing, with the burden of proof on the government, that is mandated by the statute.

In these circumstances, the court of appeals responsibly directed an *in camera* inspection by the trial court. It did so as a protection to the government, even though the government's proof *dehors* the documents had failed to meet its statutory burden. The court of appeals acted in light of its past decisions under the Act, employing the *in camera* device to refine the scope of permissible discovery where the government and trial court below had failed adequately to perform that process.

The practice of *in camera* inspection under the Freedom of Information Act is not confined to the District of Columbia Circuit where the courts have special expertise in the administration of the Act.[35]

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[35] The courts in the circuit below have frequently had recourse to *in camera* inspections in lawsuits brought under the statute. See *Soucie* v. *David, supra,* at 1079-80; *Sterling Drug, Inc.* v. *FTC,* at 703, 704; *Grumman Aircraft Eng. Corp.* v. *Renegotiation Bd, supra,* at 580-81, 582; *Bristol-Myers Co.* v. *FTC, supra,* at 939; *Ackerly* v. *Ley, supra,* at 1341; *M. A. Schapiro & Co.* v. *SEC,* 339 F.Supp., at 469; *Wecksler* v. *Shultz,* 324 F.Supp. 1084, 1087 (D.D.C. 1971); *Wellford* v. *Hardin,* 315 F.Supp. 768, 770 (D.D.C. 1970). *Accord: Boeing Airplane Co.* v. *Coggeshall,* 280 F.2d 654, 662 (D.C. Cir. 1960 (pre-Act case).

It is also followed in the Second,[36] Fourth,[37] Fifth,[38] and Ninth[39] Circuits.

B. The Petitioners' Claims of "Secrecy" and "Advice" Do Not Require a Different Approach.

1. The need for independent judicial review does not vanish simply because disputed materials allegedly involve military or diplomatic secrets.

When confronted in the past with claims of privilege founded on military secrets, the Court has not suggested judicial abandonment of the field. It has instead developed a "formula of compromise" taking into account all interests concerned. *United States* v. *Reynolds*, 345 U.S. 1, 9 (1953). "Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers." *Id.*, at 9-10.

The petitioners ask this Court to surrender the judicial function directed by *Reynolds*. They suggest that the entire field of secrecy classification is so committed to executive discretion that the federal courts can play no role whatever (Pet. 23-24).

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[36] *Frankel* v. *SEC*, 336 F.Supp. 675, 678 (S.D.N.Y. 1971), *rev'd on other grounds*, — F.2d —, (2d Cir. May 4, 1972) (No. 71-2213).

[37] *Wellford* v. *Hardin*, 315 F.Supp. 175, 179 (D.Md. 1970) *aff'd*, 444 F.2d 21 (4th Cir. 1971). See also 330 F.Supp. 915, 918 (D.Md. 1971).

[38] *Evans* v. *Dep't of Transportation*, 446 F.2d 821, 823 (5th Cir. 1971), *cert. denied*, 405 U.S. 918 (1972) (exemptions three and seven).

[39] *General Services Administration* v. *Benson*, *supra* (to determine validity of GSA's claim to fifth exemption); *Cowles Communications, Inc.* v. *Dept. of Justice*, 325 F.Supp. 726, 727 (N.D. Calif. 1971) (to determine whether certain files contain investigatory materials compiled for law-enforcement purposes under the seventh exemption).

Last Term, the Court considered—and rejected—an analogous argument by the government that the federal judiciary should be excluded from the review of electronic surveillance conducted in the name of "domestic security." The Court there said:

> "We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. *Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive to or uncomprehending of the issues involved in domestic security cases. Certainly courts can recognize that domestic security surveillance involves different considerations from the surveillance of ordinary crime.* If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance.
>
> "Nor do we believe prior judicial approval will fracture the secrecy essential to official intelligence gathering. *The investigation of criminal activity has long involved imparting sensitive information to judicial officers who have respected the confidentialities involved. Judges may be counted upon to be especially conscious of security requirements in national security cases.* Title III of the Omnibus Crime Control and Safe Streets Act already has imposed this responsibility on the judiciary in connection with such crimes as espionage, sabotage and treason, [18 U.S.C.] § 2516 (1)(a)(c), each of which may involve domestic as well as foreign security threats. *Moreover, a warrant application involves no public or adversary proceedings: it is an ex parte request before a magistrate or judge.* Whatever security dangers clerical and secretarial personnel may pose can be minimized by proper administrative measures, possibly to the point of allowing the Govern-

ment itself to provide the necessary clerical assistance." *United States* v. *United States District Court, supra,* 40 U.S.L.W., at 4768 (emphasis supplied).[40]

2. A general assertion that disputed materials are all "advisory" does not conclude analysis under the fifth exemption.

As the court below has cautioned, "courts must beware of 'the inevitable temptation of a government litigant to give [the fifth exemption] an expansive interpretation in relation to the particular records at issue.'" *Soucie* v. *David, supra,* at 1078; *Ackerly* v.

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[40] In support of their claim that the first exemption automatically and without judicial review upon an involation of Executive Order 10501, the petitioners rely upon the decision of the Court of Appeals for the Ninth Circuit in *Epstein* v. *Resor,* 421 F.2d 930, *cert. denied,* 398 U.S. 965 (1970). But far from supporting the petitioners, *Epstein* confirms the interpretation of the Act advanced by the court below.

Epstein stands for the very proposition that the federal judiciary may determine in a Freedom of Information Act suit whether various portions of classified documents should be released (Pet. 15). The district court in *Epstein* said:

> "[I]t is equally without merit to say that Congress intended absolutely no effect by the Act on information that falls within the areas covered by the exemptions. The district courts at least have jurisdiction to determine whether the exemption applies in a given situation. In furtherance of this jurisdiction, it is reasonable to say that Congress intended the courts to determine whether classification within the first exemption is clearly arbitrary and unsupportable. Otherwise, the agencies could easily frustrate the purpose of full disclosure intended by Congress merely by labeling the information to fall within the exemption." 296 F.Supp., at 217.

The court of appeals expressly affirmed this holding, agreeing with the district court's ruling that "under (b)(1) it had authority to determine whether classification was arbitrary or capricious." 421 F.2d, at 933.

Ley, supra, at 1341. The burden is on the Government to prove that "releasing the factual information . . . will expose the decisional processes of the President or other executive officers with policy-making functions." *Soucie* v. *David, supra.*

An illustration of the importance of preserving judicial review of agency claims that documents are entirely "advisory" is afforded by *Soucie* v. *David, supra.* There the Office of Science and Technology ("OST")—a petitioner here—sought to withhold the Garwin Report, a study of the supersonic transport plane (the "SST") prepared by an *ad hoc* committee that it had convened. The government resisted disclosure of the Report on the ground that it "was prepared for the sole purpose of conveying views, evaluations, opinions and recommendations to the President, at the President's request. It was prepared as an aid to the President in the course of his deliberations, and for no other purpose" (DuBridge Aff., ¶ 3, filed in C.A. No. 1571-71 (D.D.C.)).

In remanding to the district court, the court of appeals set forth the distinction between factual information and advice adverted to above, and envisaged an *in camera* inspection in aid of that distinction. Subsequent to the remand—and well after Congressional defeat of the SST proposal—the OST released the very report it had struggled for over a year to withhold. Examination of the report reveals the error in the OST's initial refusal to disclose it to the public.[41] Although the report contains recommendations and advice, consideration of the document as a whole estab-

[41] A copy of the SST report has been lodged with the Clerk of the Court.

lishes that its factual materials could be segregated for public release, and even that its release in its entirety could not impair "the decisional processes of the President." Moreover, the OST's release of the report without injury to the decisional process—albeit after the SST question became academic—demonstrates that the mere claim that the agency exists to give advice, or that its work-product is solely advisory, should not suffice to confer immunity under the exemption.

With respect to both the first and fifth exemptions, "The Government should not be allowed to file an affidavit stating [the] conclusion [that a document is exempt under the Act] and by so doing foreclose any other determination of the fact." *Cowles Communications* v. *Department of Justice,* 325 F. Supp. 726, 727 (N.D. Cal. 1971). *Accord: Frankel* v. *SEC,* 336 F. Supp. 675, 677 n. 4 (S.D.N.Y. 1971), *rev'd on other grounds,* —— F. 2d —— (2d Cir. May 4, 1972) (No. 71-2213). In sum, the federal judiciary cannot accept an unreviewable claim of privilege—certainly not where Congress has mandated by statute that the government carry the burden of persuasion on the question whether it is entitled to withhold information from the public. The petitioners' assertion that the documents here at issue all fall within one or both of the two exemptions amounts to a thinly disguised rejection of *any* role for the federal judiciary in the administration of the Freedom of Information Act, and a destruction of the Act itself. Their position effectively is that the statutory requirement of *de novo* judicial review, with the burden of proof of the agency should be drained of meaning and that independent judicial inquiry may be foreclosed by the *ex parte* assertion that records are immune to disclosure. That position must be rejected if the Act is to survive.

IV. RESPONDENTS ARE ENTITLED TO SEEK DISCLOSURE AS MEMBERS OF CONGRESS AND AS SUCH THEY ARE NOT SUBJECT TO THE EXEMPTIONS IN THE ACT.

Respondents brought this litigation in their individual capacities both as Members of Congress and as private citizens. They urged that, as Members of Congress, they were not subject to the exemptions in the Act. (App. 14; R. 5, 9). The District Court dismissed the suit "insofar as [respondents] seek to maintain the action in their capacity as Members of Congress on the ground that [they] have failed to present a justiciable case or controversy, and they may not maintain the action in that capacity by reason of the Separation of Powers provisions of the Constitution." (Pet. App. 32). The District Court was clearly wrong in that conclusion and that error precludes reinstatement of the District Court judgment as now urged by the government in this Court.[42]

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[42] The issues discussed in this section of respondents' brief were raised in, but not decided by, the court of appeals. However, respondents are entitled to rely on these issues in support of the court of appeals' judgment vacating the judgment of the District Court and remanding the case for further proceedings.

As the Court stated in *Dandridge* v. *Williams*, 397 U.S. 471 (1970):

> "The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court. Compare *Langnes* v. *Green*, 282 U.S. 531, 538, with *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555-567-568. As the Court said in *United States* v. *American Ry. Exp. Co.*, 265 U.S. 425, 435-436: '[I]t is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it. By the claims now in question,

A. As Members of Congress, Respondents Are Not Subject to the Act's Exemptions From Disclosure.

As private citizens, respondents are clearly "persons" within the meaning of the Act and entitled to all the rights of persons seeking information under the Act. In addition, however, respondents are duly sworn and elected Members of Congress. As such, they have an independent statutory right to information under the Act. Although the Act authorizes the withholding of certain information from the "public," it specifically states that it "is not authority to withhold information from Congress." § 552(c).[43]

The statutory language cited above must be read in context. The Act expresses a general rule of disclosure and authorizes limited exemptions from disclosure in § 552(b). In subsection (c), it specifies that those exemptions authorize the withholding of information from "the public." But, continuing, it emphasizes that the contents of the section are "not authority to withhold information from Congress." Thus, the exemptions spelled out in § 552(b) are inapplicable to respondents as Members of Congress. In the absence of any exemption, the general rule of disclosure applies.

The Court of Appeals for the District of Columbia Circuit has previously seemed to confirm respondents' reading of the Act. It has noted that while the right of a Congressman as a private person "to obtain [in-

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the American does not attack, in any respect, the decree entered below. It merely asserts additional grounds why the decree should be affirmed.'" *Dandridge, supra,* at 475, n. 6.

[43] "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress." 5 U.S.C. § 552(c).

formation] . . . under the Act is equal to that of [a private citizen] . . ., *his right as a Congressman is presumably greater.*" *Soucie* v. *David, supra,* at 1071, n. 6 (emphasis added). See also *id.* at 1081 (Wilkey, J., concurring).

It is readily apparent why Congress would distinguish between information available to the public and information available only to members of Congress. Congressmen have special needs for access to governmental information. Their constitutional obligation necessarily requires regular access to documents and information which would not routinely be available to the public. As Mr. Justice Stewart stated recently, "In preparing for legislative hearings, debates and roll calls, a member of Congress obviously needs the broadest possible range of information. Valuable information may often come from sources in the Executive Branch or from citizens in private life." *Gravel* v. *United States,* — U.S. — (Nos. 71-1017, 71-1016, June 29, 1972), 40 U.S.L.W. 5053, 5060. Section 552(c) recognizes this distinction and incorporates it in express language.

The real question of congressional and executive power presented by this case is whether the Freedom of Information Act will impede further erosion of Congress' constitutional role as a co-equal branch of the United States government. The practical inability of Congress as an institution to obtain needed information is well known. Any assumption that the congressional hearing process is totally sufficient to obtain necessary information is false. The recent efforts of the Senate Foreign Relations Committee to obtain information concerning the war in Indochina and foreign aid plans from the Defense Department and the De-

partment of State are but isolated instances of a much larger institutional problem.

The inability of Congress itself to obtain information from the Executive is magnified several times over when an individual Congressman seeks such information. It is possible that committee chairmen, senior members of Congress, or close friends of executive officers can obtain needed information. But the freshman Congressman or member of the opposition party faces a high hurdle in his inquiries. Although a Congressional committee might be able to obtain information from the Executive, frequently an individual Congressman—hemmed in by the seniority system and other hierarchical barriers—cannot get the committee to act. And if individual Congressmen are uninformed, the power of government rests not in the people and their representatives but in the hands of a few powerful and well-informed individuals. Appellants contend that the Freedom of Information Act represents a Congressional attempt to remedy this situation by vesting special rights of access to information in Members of Congress. In evaluating this contention, it is well to remember the words of Mr. Justice Jackson: "I cannot be brought to believe that this country will suffer if the Court refuses further to aggrandize the presidential office, already so potent and so relatively immune from judicial review, at the expense of the Congress." *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 654 (1952) (concurring opinion).

B. Respondents' Capacity To Sue as Members of Congress Does Not Present a Non-Justiciable Issue.

By dismissing the action on grounds of justiciability, the district court in effect declined to exercise its power to decide a case which fell within its subject matter jurisdiction. See *Baker* v. *Carr,* 369 U.S. 186, 198 (1962). The refusal to hear the case on grounds of nonjusticiability was, however, clearly erroneous.

This Court recently noted that two determinations must be made as to justiciability:

> "First, we must decide whether the claim presented and the relief sought are of the type which admit of judicial resolution. Second, we must determine whether the structure of the Federal Government renders the issue presented a 'political question'—that is, a question which is not justiciable in federal court because of the separation of powers provided by the Constitution." *Powell* v. *McCormack,* 395 U.S. at 516-17.

The question under the first test is a narrow one, namely "whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded." *Baker* v. *Carr,* 369 U.S. at 198. The case at hand does not present a problem of justiciability under that test. The duty at issue and its breach—the duty to disclose and the failure to do so—can be judicially determined; and a judicial remedy may be readily fashioned. Such a task is involved in every suit under the Freedom of Information Act and is not changed because Congressmen are the plaintiffs. The second test of justiciability, namely a decision not to exercise jurisdiction because of the separation of

powers within the Federal Government might be considered more relevant.

Again, however, it is not within the discretionary power of a federal court to dismiss every suit that raises an issue of separation of powers. Instead, there are few instances in which separation-of-powers cases may be dismissed as nonjusticiable. They consist, exclusively, of ones in which

> "is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on the question." *Baker* v. *Carr,* 369 U.S. at 217.

The case at hand does not fall within any of the above categories. It raises no issues that the Constitution has committed to another branch of the government. It involves no determination of standards or policy that the judiciary is incapable of making. And it does not concern a matter in which the courts would lack the final word. Instead, it is simply a case in which individuals seek relief under an Act of Congress vesting them with a cause of action. And to the extent that it calls upon the courts to fashion standards, to apply them, and to enforce their decision, it differs in no way from other Freedom of Information Act suits.

The fact that respondents seek a determination of their rights "as Congressmen" does not make the issue nonjusticiable. *See, e.g. Powell* v. *McCormack,* 395 U.S. 486 (1969); *Gravel* v. *United States,* — U.S. — (Nos. 71-1017, 1026) (June 29, 1972); *United States* v. *Brewster,* — U.S. — (No. 70-45) (June 29, 1972). Nor is it relevant that the Congressmen are suing other government officials and agencies. Federal officers have frequently sued federal agencies. *See, e.g., United States ex rel. Chapman* v. *FPC,* 345 U.S. 153 (1953); *Secretary of Agriculture* v. *United States,* 347 U.S. 645 (1954); *Udall* v. *FPC,* 387 U.S. 428 (1967); *Summerfield* v. *CAB,* 207 F.2d 200 (D.C. Cir. 1953), aff'd sub nom. *Western Air Lines, Inc.* v. *CAB,* 347 U.S. 67 (1954).

The district court in effect reached out to decide a constitutional issue of "separation of powers" that was not presented in the case. Troubled by the fact that respondents sued in their capacities as Congressmen, the district court interpreted the suit as presenting a constitutional challenge by Congress to the President's decision to withhold information. The district court unjustifiably assumed it was being asked to arbitrate a constitutional conflict between coordinate branches of the federal government. This case does not raise such an issue. Instead, what the district court—and now this Court—was being asked to do was simply to decide whether the Freedom of Information Act provides respondents with special claims for relief in their capacities as Congressmen.

CONCLUSION

For the foregoing reasons, the respondents respectfully submit that the judgment of the Court of Appeals should be affirmed.

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APPENDIX A

Title 3—The President

EXECUTIVE ORDER 11652

Classification and Declassification of National Security Information and Material

The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the executive branch.

Within the Federal Government there is some official information and material which, because it bears directly on the effectiveness of our national defense and the conduct of our foreign relations, must be subject to some constraints for the security of our Nation and the safety of our people and our allies. To protect against actions hostile to the United States, of both an overt and covert nature, it is essential that such official information and material be given only limited dissemination.

This official information or material, referred to as classified information or material in this order, is expressly exempted from public disclosure by Section 552(b)(1) of Title 5, United States Code. Wrongful disclosure of such information or material is recognized in the Federal Criminal Code as providing a basis for prosecution.

To ensure that such information and material is protected, but only to the extent and for such period as is necessary, this order identifies the information to be protected, prescribes classification, downgrading, declassification and safeguarding procedures to be followed, and establishes a monitoring system to ensure its effectiveness.

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, it is hereby ordered:

SECTION 1. *Security Classification Categories.* Official information or material which requires protection against unauthorized disclosure in the interest of the national defense or foreign relations of the United States (hereinafter collectively termed "national security") shall be classified in one of three categories, namely "Top Secret," "Secret," or "Confidential," depending upon the degree of its significance to national security. No other categories shall be used to identify official information or material as requiring protection in the interest of national security, except as otherwise expressly provided by statute. These classification categories are defined as follows:

(A) *"Top Secret."* "Top Secret" refers to that national security information or material which requires the highest degree of protection. The test for assigning "Top Secret" classification shall be whether its unauthorized disclosure could reasonably be expected to cause exceptionally grave damage to the national security. Examples of "exceptionally grave damage" include armed hostilities against the United States or its allies; disruption of foreign relations vitally affecting the national security; the compromise of vital national defense plans or complex cryptologic and communications intelligence systems; the revelation of sensitive intelligence operations; and the disclosure of scientific or technological developments vital to national security. This classification shall be used with the utmost restraint.

(B) *"Secret."* "Secret" refers to that national security information or material which requires a substantial degree of protection. The test for assigning "Secret" classification shall be whether its unuathorized disclosure could reasonably be expected to cause serious damage to the national security. Examples of "serious damage" include

disruption of foreign relations significantly affecting the national security; significant impairment of a program or policy directly related to the national security; revelation of significant military plans or intelligence operations; and compromise of significant scientific or technological developments relating to national security. The classification "Secret" shall be sparingly used.

(C) *"Confidential."* "Confidential" refers to that national security information or material which requires protection. The test for assigning "Confidential" classification shall be whether its unauthorized disclosure could reasonably be expected to cause damage to the national security.

SEC. 2. *Authority to Classify.* The authority to originally classify information or material under this order shall be restricted solely to those offices within the executive branch which are concerned with matters of national security, and shall be limited to the minimum number absolutely required for efficient administration. Except as the context may otherwise indicate, the term "Department" as used in this order shall include agency or other governmental unit.

(A) The authority to orginally classify information or material under this order as "Top Secret" shall be exercised only by such officials as the President may designate in writing and by:

(1) The heads of the Departments listed below;

(2) Such of their senior principal deputies and assistants as the heads of such Departments may designate in writing; and

(3) Such heads and senior principal deputies and assistants of major elements of such Departments, as the heads of such Departments may designate in writing.

Such offices in the Executive Office of the President as the President may designate in writing
Central Intelligence Agency

the Department in possession after consulting with any other Departments having an interest in the subject matter.

(E) Classified information or material transferred to the General Services Administration for accession into the Archives of the United States shall be downgraded and declassified by the Archivist of the United States in accordance with this order, directives of the President issued through the National Security Council and pertinent regulations of the Departments.

(F) Classified information or material with special markings, as described in Section 8, shall be downgraded and declassified as required by law and governing regulations.

SEC. 4. *Classification.* Each person possessing classifying authority shall be held accountable for the propriety of the classifications attributed to him. Both unnecessary classification and over-classification shall be avoided. Classification shall be solely on the basis of national security considerations. In no case shall information be classified in order to conceal inefficiency or administrative error, to prevent embarrassment to a person or Department, to restrain competition or independent initiative, or to prevent for any other reason the release of information which does not require protection in the interest of national security. The following rules shall apply to classification of information under this order:

(A) *Documents in General.* Each classified document shall show on its face its classification and whether it is subject to or exempt from the General Declassification Schedule. It shall also show the office of origin, the date of preparation and classification and, to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use. Material containing

references to classified materials, which references do not reveal classified information, shall not be classified.

(B) *Identification of Classifying Authority.* Unless the Department involved shall have provided some other method of identifying the individual at the highest level that authorized classification in each case, material classified under this order shall indicate on its face the identity of the highest authority authorizing the classification. Where the individual who signs or otherwise authenticates a document or item has also authorized the classification, no further annotation as to his identity is required.

(C) *Information or Material Furnished by a Foreign Government or International Organization.* Classified information or material furnished to the United States by a foreign government or international organization shall either retain its original classification or be assigned a United States classification. In either case, the classification shall assure a degree of protection equivalent to that required by the government or international organization which furnished the information or material.

(D) *Classification Responsibilities.* A holder of classified information or material shall observe and respect the classification assigned by the originator. If a holder believes that there is unnecessary classification, that the assigned classification is improper, or that the document is subject to declassification under this order, he shall so inform the originator who shall thereupon re-examine the classification.

SEC. 5. *Declassification and Downgrading.* Classified information and material, unless declassified earlier by the original classifying authority, shall be declassified and downgraded in accordance with the following rules:

(A) *General Declassification Schedule.* (1) "Top Secret." Information or material originally classified "Top Secret" shall become automatically downgraded to "Secret" at the

end of the second full calendar year following the year in which it was originated, downgraded to "Confidential" at the end of the fourth full calendar year following the year in which it was originated, and declassified at the end of the tenth full calendar year following the year in which it was originated.

(2) *"Secret."* Information and material originally classified "Secret" shall become automatically downgraded to "Confidential" at the end of the second full calendar year following the year in which it was originated, and declassified at the end of the eighth full calendar year following the year in which it was originated.

(3) *"Confidential."* Information and material originally classified "Confidential" shall become automatically declassified at the end of the sixth full calendar year following the year in which it was originated.

(B) *Exemptions from General Declassification Schedule.* Certain classified information or material may warrant some degree of protection for a period exceeding that provided in the General Declassification Schedule. An official authorized to originally classify information or material "Top Secret" may exempt from the General Declassification Schedule any level of classified information or material originated by him or under his supervision if it falls within one of the categories described below. In each case such official shall specify in writing on the material the exemption category being claimed and, unless impossible, a date or event for automatic declassification. The use of the exemption authority shall be kept to the absolute minimum consistent with national security requirements and shall be restricted to the following categories:

(1) Classified information or material furnished by foreign governments or international organizations and held by the United States on the understanding that it be kept in confidence.

(2) Classified information or material specifically covered by statute, or pertaining to cryptography, or disclosing intelligence sources or methods.

(3) Classified information or material disclosing a system, plan, installation, project or specific foreign relations matter the continuing protection of which is essential to the national security.

(4) Classified information or material the disclosure of which would place a person in immediate jeopardy.

(C) *Mandatory Review of Exempted Material.* All classified information and material originated after the effective date of this order which is exempted under (B) above from the General Declassification Schedule shall be subject to a classification review by the originating Department at any time after the expiration of ten years from the date of origin provided:

(1) A Department or member of the public requests a review;

(2) The request describes the record with sufficient particularity to enable the Department to identify it; and

(3) The record can be obtained with only a reasonable amount of effort.

Information or material which no longer qualifies for exemption under (B) above shall be declassified. Information or material continuing to qualify under (B) shall be so marked and, unless impossible, a date for automatic declassification shall be set.

(D) *Applicability of the General Declassification Schedule to Previously Classified Material.* Information or material classified before the effective date of this order and which is assigned to Group 4 under Executive Order No. 10501, as amended by Executive Order No. 10964, shall be subject to the General Declassification Schedule. All other

information or material classified before the effective date of this order, whether or not assigned to Groups 1, 2, or 3 of Executive Order No. 10501, as amended, shall be excluded from the General Declassification Schedule. However, at any time after the expiration of ten years from the date of origin it shall be subject to a mandatory classification review and disposition under the same conditions and criteria that apply to classified information and material created after the effective date of this order as set forth in (B) and (C) above.

(E) *Declassification of Classified Information or Material After Thirty Years.* All classified information or material which is thirty years old or more, whether originating before or after the effective date of this order, shall be declassified under the following conditions:

(1) All information and material classified after the effective date of this order shall, whether or not declassification has been requested, become automatically declassified at the end of thirty full calendar years after the date of its original classification except for such specifically identified information or material which the head of the originating Department personally determines in writing at that time to require continued protection because such continued protection is essential to the national security or disclosure would place a person in immediate jeopardy. In such case, the head of the Department shall also specify the period of continued classification.

(2) All information and material classified before the effective date of this order and more than thirty years old shall be systematically reviewed for declassification by the Archivist of the United States by the end of the thirtieth full calendar year following the year in which it was originated. In his review, the Archivist will separate and keep protected only such information or material as is specifically identified by the head of the Department in accordance with (E)(1) above. In such case, the head of the De-

partment shall also specify the period of continued classification.

(F) *Departments Which Do Not Have Authority For Original Classification.* The provisions of this section relating to the declassification of national security information or material shall apply to Departments which, under the terms of this order, do not have current authority to originally classify information or material, but which formerly had such authority under previous Executive orders.

SEC. 6. *Policy Directives on Access, Marking, Safekeeping, Accountability, Transmission, Disposition and Destruction of Classified Information and Material.* The President acting through the National Security Council shall issue directives which shall be binding on all Departments to protect classified information from loss or compromise. Such directives shall conform to the following policies:

(A) No person shall be given access to classified information or material unless such person has been determined to be trustworthy and unless access to such information is necessary for the performance of his duties.

(B) All classified information and material shall be appropriately and conspicuously marked to put all persons on clear notice of its classified contents.

(C) Classified information and material shall be used, possessed, and stored only under conditions which will prevent access by unauthorized persons or dissemination to unauthorized persons.

(D) All classified information and material disseminated outside the executive branch under Executive Order No. 10865 or otherwise shall be properly protected.

(E) Appropriate accountability records for classified information shall be established and maintained and such information and material shall be protected adequately during all transmissions.

(F) Classified information and material no longer needed in current working files or for reference or record purposes shall be destroyed or disposed of in accordance with the records disposal provisions contained in Chapter 33 of Title 44 of the United States Code and other applicable statutes.

(G) Classified information or material shall be reviewed on a systematic basis for the purpose of accomplishing downgrading, declassification, transfer, retirement and destruction at the earliest practicable date.

SEC. 7. *Implementation and Review Responsibilities.* (A) The National Security Council shall monitor the implementation of this order. To assist the National Security Council, an Interagency Classification Review Committee shall be established, composed of representatives of the Departments of State, Defense, and Justice, the Atomic Energy Commission, the Central Intelligence Agency and the National Security Council Staff and a Chairman designated by the President. Representatives of other Departments in the executive branch may be invited to meet with the Committee on matters of particular interest to those Departments. This Committee shall meet regularly and on a continuing basis shall review and take action to ensure compliance with this order, and in particular:

(1) The Committee shall oversee Department actions to ensure compliance with the provisions of this order and implementing directives issued by the President through the National Security Council.

(2) The Committee shall, subject to procedures to be established by it, receive, consider and take action on suggestions and complaints from persons within or without the government with respect to the administration of this order, and in consultation with the affected Department or Departments assure that appropriate action is taken on such suggestions and complaints.

(3) Upon request of the Committee Chairman, any Department shall furnish to the Committee any particular information or material needed by the Committee in carrying out its functions.

(B) To promote the basic purposes of this order, the head of each Department originating or handling classified information or material shall:

(1) Prior to the effective date of this order submit to the Interagency Classification Review Committee for approval a copy of the regulations it proposes to adopt pursuant to this order.

(2) Designate a senior member of his staff who shall ensure effective compliance with and implementation of this order and shall also chair a Departmental committee which shall have authority to act on all suggestions and complaints with respect to the Department's administraion of this order.

(3) Undertake an initial program to familiarize the employees of his Department with the provisions of this order. He shall also establish and maintain active training and orientation programs for employees concerned with classified information or material. Such programs shall include, as a minimum, the briefing of new employees and periodic reorientation during employment to impress upon each individual his responsibility for exercising vigilance and care in complying with the provisions of this order. Additionally, upon termination of employment or contemplated temporary separation for a sixty-day period or more, employees shall be debriefed and each reminded of the provisions of the Criminal Code and other applicable provisions of law relating to penalties for unauthorized disclosure.

(C) The Attorney General, upon request of the head of a Department, his duly designated representative, or the Chairman of the above described Committee, shall personally or through authorized representatives of the Depart-

ment of Justice render an interpretation of this order with respect to any question arising in the course of its administration.

SEC. 8. *Material Covered by the Atomic Energy Act.* Nothing in this order shall supersede any requirements made by or under the Atomic Energy Act of August 30, 1954, as amended. "Restricted Data," and material designated as "Formerly Restricted Data," shall be handled, protected, classified, downgraded and declassified in conformity with the provisions of the Atomic Energy Act of 1954, as amended, and the regulations of the Atomic Energy Commission.

SEC. 9. *Special Departmental Arrangements.* The originating Department or other appropriate authority may impose, in conformity with the provisions of this order, special requirements with respect to access, distribution and protection of classified information and material, including those which presently relate to communications intelligence, intelligence sources and methods and cryptography.

SEC. 10. *Exceptional Cases.* In an exceptional case when a person or Department not authorized to classify information originates information which is believed to require classification, such person or Department shall protect that information in the manner prescribed by this order. Such persons or Department shall transmit the information forthwith, under appropriate safeguards, to the Department having primary interest in the subject matter with a request that a determinaion be made as to classification.

SEC. 11. *Declassification of Presidential Papers.* The Archivist of the United States shall have authority to review and declassify information and material which has been classified by a President, his White House Staff or special committee or commission appointed by him and which the Archivist has in his custody at any archival depository, including a Presidential Library. Such declassifi-

cation shall only be undertaken in accord with: (i) the terms of the donor's deed of gift, (ii) consultations with the Departments having a primary subject-matter interest, and (iii) the provisions of Section 5.

SEC. 12. *Historical Research and Access by Former Government Officials.* The requirement in Section 6(A) that access to classified information or material be granted only as is necessary for the performance of one's duties shall not apply to persons outside the executive branch who are engaged in historical research projects or who have previously occupied policy-making positions to which they were appointed by the President; *Provided,* however, that in each case the heading of the originating Department shall:

(i) determine that access is clearly consistent with the interests of national security; and

(ii) take appropriate steps to assure that classified information or material is not published or otherwise compromised.

Access granted a person by reason of his having previously occupied a policy-making position shall be limited to those papers which the former official originated, reviewed, signed or received while in public office.

SEC. 13. *Administrative and Judicial Action.* (A) Any officer or employee of the United States who unnecessarily classifies or overclassifies information or material shall be notified that his actions are in violation of the terms of this order or of a directive of the President issued through the National Security Council. Repeated abuse of the classification process shall be grounds for an administrative reprimand. In any case where the Departmental committee or the Interagency Classification Review Committee finds that unnecessary classification or overclassification has occurred, it shall make a report to the head of the Department concerned in order that corrective steps may be taken.

(B) The head of each Department is directed to take prompt and stringent administrative action against any officer or employee of the United States, at any level of employment, determined to have been responsible for any release or disclosure of national security information or material in a manner not authorized by or under this order or a directive of the President issued through the National Security Council. Where a violation of criminal statutes may be involved, Departments will refer any such case promptly to the Department of Justice.

SEC. 14. *Revocation of Executive Order No. 10501.* Executive Order No. 10501 of November 5, 1953, as amended by Executive Orders No. 10816 of May 8, 1959, No. 10901 of January 11, 1961, No. 10964 of September 20, 1961, No. 10985 of January 15, 1962, No. 11907 of March 6, 1963 and by Section 1(a) of No. 11382 of November 28, 1967, is superseded as of the effective date of this order.

SEC. 15. *Effective date.* This order shall become effective on June 1, 1972.

/s/ RICHARD NIXON

THE WHITE HOUSE,
March 8, 1972.

APPENDIX B

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES (ESTABLISHING A PROCEDURE TO GOVERN COMPLIANCE WITH CONGRESSIONAL DEMANDS FOR INFORMATION)

MARCH 24, 1969.

The policy of this administration is to comply to the fullest extent possible with congressional requests for information. While the executive branch has the responsibility of withholding certain information the disclosure of which would be incompatible with the public interest. This ad-

ministration will invoke this authority only in the most compelling circumstances and after a rigorous inquiry into the actual need for its exercise. For those reasons executive privilege will not be used without specific Presidential approval. The following procedural steps will govern the invocation of executive privilege:

1. If the head of an executive department or agency (hereafter referred to as "department head") believes that compliance with a request for information from a congressional agency addressed to his department or agency raises a substantial question as to the need for invoking executive privilege, he should consult the Attorney General through the Office of Legal Counsel of the Department of Justice.

2. If the department head and the Attorney General agree, in accordance with the policy set forth above, that executive privilege shall not be invoked in the circumstances, the information shall be released to the inquiring congressional agency.

3. If the department head and the Attorney General agree that the circumstances justify the invocation of executive privilege, or if either of them believes that the issue should be submitted to the President, the matter shall be transmitted to the Counsel to the President, who will advise the department head of the President's decision.

4. In the event of a Presidential decision to invoke executive privilege, the department head should advise the congressional agency that the claim of executive privilege is being made with the specific approval of the President.

5. Pending a final determination of the matter, the department head should request the congressional agency to hold its demand for the information in abeyance until such determination can be made. Care shall be taken to indicate that the purpose of this request is to protect the privilege pending the determination, and that the request does not constitute a claim of privilege.

RICHARD NIXON.

APPENDIX C

Status of Documents in Issue

Irwin Affidavit Reference	Description	Publicly Available	Section (b)(1) Invoked	Section (b)(5) Invoked	Already Reviewed *in Camera* in Nuclear Responsibility
¶ A	Covering Memo	No	Yes	Yes	No
¶ B	Report of Irwin Committee	No	Yes	Yes	No
¶ B1	AEC-Seaborg Letter	Parts	Parts(?)	Parts(?)	Yes
¶ B2	Kissinger Report	No	Yes	Yes	No
¶ B3	Impact Statement	Yes	No	No	No
¶ B4	AEC-Briefing Transcript	Parts	Parts	Parts(?)	Yes
¶ B5	CEQ Memorandum	Parts	No	Parts	Yes
¶ C	Ruckelshaus Letter	No	No	Yes	Yes
¶ C	Train Letter	No	No	Yes	Yes
¶ C	David Letter	No	Yes	Yes	Yes

~~SECRET~~

APPENDIX D

EFFECTS EVALUATION
FOR
CANNIKIN EVENT

By Merritt

January 1971

United States Atomic Energy Commission
Nevada Operations Office

Handle as Restricted Data in
Foreign Dissemination Section
144B, Atomic Energy Act, 1954

[omission]

Group 1
Excluded from Automatic
Downgrading and
Declassification

[omission]

~~SECRET~~

ABSTRACT

CANNIKIN is to be [deletion] megaton detonation 5875 feet deep on Amchitka Island, Alaska in late September, 1971. Its purpose is a proof test of the Spartan warhead.

In evaluating the possible effects of the shot, the dominant considerations are containment of radioactivity, effects on the ecology and the possibility of triggering a large earthquake and generating a damaging tsunami. Containment should be assured because CANNIKIN's scaled depth of burst is well within the range shown acceptable by experience at the Nevada Test Site and previously at Amchitka. Ecological effects expected are those associated with construction and site preparation activities, cracks and tears in the tundra associated with surface subsidence, killing of stickleback in a few nearby lakes, rock and turf falls on adjacent coasts with possible disturbance of a few (<7) bird nesting sites, and overpressure damage to a few (<20) sea otters in the nearby sea. As to a tsunamigenic earthquake, three things must happen in sequence; first, a major earthquake would have to be triggered; second, that earthquake would have to generate an important tsunami; and finally, that tsunami would have to be directed at populated coastal regions. All are individually unlikely so that the risk of tsunami damage appears negligible. Nevertheless the Tsunami Warning Network will be specially alerted for CANNIKIN.

Various experimental programs are being undertaken to verify these predictions and to help predict effects for later shots, should Amchitka ever be needed again.

We conclude that the CANNIKIN event may be safety carried out as planned.

1.0 Introduction

1.1 *Description*

The CANNIKIN event is a proposed full yield [deletion] test of the Spartan [deletion] Warhead designed by the Lawrence Radiation Laboratory, to be conducted at Site C (Hole UA-1), Amchitka Island, Alaska. This island is near the center of the Aleutian Island arc (51.5°N, 179°E; see maps, Figures 1 and 2). The device is to be placed at a depth of 5875 feet in volcanic breccias underlying the Banjo Point and Kirilof Point formations. The planned ready date is September 15, 1971.

1.2 *Purpose*

The purpose of the CANNIKIN event is to provide experimental verification of the yield and outputs of the Spartan Warhead. This report summarizes the predicted physical and biological effects of the CANNIKIN detonation. It also describes studies which have been or are to be carried out to give greater credence to these predictions and to verify them after the fact. This effects prediction uses information available as of December 1, 1970.

1.3 *Responsibilities*

This report has been prepared at the request of the Office of Effects Evaluation, NVOO, from contributions by the Battelle Memorial Institute, (BMI), the Environmental Research Corporation (ERC), the U. S. Geological Survey (USGS), Teledyne Isotopes Palo Alto Laboratories (TI),

the National Oceanic and Atmospheric Administration's Air Resources Laboratory (ARL), the U. S. Public Health Service (USPHS), the Lawrence Radiation Laboratory (LRL), and the Sandia Laboratories (SL).

Dr. M. L. Merritt of Sandia Laboratories, Albuquerque, has been named Effects Evaluation Scientist for the CANNIKIN event and is responsible for compiling the results contained in this report. Mr. R. L. Ballard, is Effects Officer.

1.4 *Evaluation by NVOO Panels and Committees*

Two previous shots have been detonated at Amchitka, the Long Shot event of October 29, 1965, an ARPA/DOD-sponsored event of 80 kt at a depth of 2350 feet, and the MILROW event of October 2, 1969, an AEC-sponsored "calibration" event of [deletion] at a depth of 4000 feet. Amchitka was chosen as a Supplemental Test Site in 1967 after a review that included geological considerations, ground motion, ground water [8] contamination, ecological effects, airblast, and seismic sea waves. Similar reviews were carried out preparatory to MILROW and of MILROW results.

CANNIKIN is reviewed by three NVOO panels. The Test Evaluation Panel reviews the containment aspects of the project; the NVOO Panel of Consulants and the Ad Hoc Committee on Seismology review the overall environmental safety efforts including ground motion, water contamination, ecological effects, seismic effects and seismic sea waves, only excluding the possibility of release of radioactivity to the atmosphere. In addition,

the Nuclear Safety Study Group performs review of the assembly, transportation, emplacement, timing and firing, and arming and firing phases of the proposed device.

The Test Evaluation Panel will review CANNIKIN on January 26, 1971, and at every meeting thereafter.

The NVOO Panel of Consultants met on November 19-20, 1969, reviewing MILROW results among other things. The Ad Hoc Committee on Seismology (also called the Ad Hoc Committee on Aftershocks and Seismic Phenomena), met on December 11-12, 1969, to hear briefings on seismic and related measurements made on JORUM and MILROW. The Panel met again on June 9-10, 1970, and the combined Panel and Ad Hoc Committee on January 12-13, 1971. The letter reports resulting from the last four meetings are given in full in Appendix A.

The Panel concluded during its November 1969, meeting that they saw "no unusual problems or hazards." They discussed ground water contamination at length and reserved judgment until studies were further along, returning to the subject in January 1971.

In its December 1969 meeting the Ad Hoc Committee on Seismology said, "As a result of the MILROW event we see no reasons to have greater concern than that expressed in our reports of May 22 and June 24, 1969, but we must respect our earlier statement that a small but non-negligible chance exists that a nuclear detonation on Am-

chitka could prematurely trigger a major earthquake in the vicinity."

And later, regarding tsunamis:

"The possibility of a tsunami hazard in connection with Amchitka testing can be subdivided into two categories:

(1) direct generation caused by ground upheaval or by local fault dislocations associated with cavity expansion, and

[9]

(2) indirect generation arising from premature stimulation of a large natural earthquake...

"The MILROW event produced smaller ground unheaval than the predictions used for pre-shot water wave calculations. No waves were observed following MILROW that were above noise threshold."

"Even a yield several times as large would not be expected to significantly alter these results. Thus, we conclude that direct generation of tsunamic is not a probable hazard."

"As regards indirect generation, in addition to the recommendations herein, concerning the improvement of assessment of the triggering potential of large earthquakes, it is recognized as important to examine the potential for tsunami generation from reasonable earthquake models in the Amchitka region."

The Committee went on to recommend a number of studies along this line, but did not at that time

make a specific judgment about the probability of a tsunami being generated if an earthquake were triggered.

By the time of their June 1970, meeting, the NVOO Panel of Consultants had been expanded to include experts in the biological sciences and some of the members of the Ad Hoc Committee on Seismology. At this meeting, in addition to reviewing the basic safety itself of upcoming tests, the Panel looked in detail at the proposed programs. With regard to earthquake safety, they reached the same conclusion as before, but in quite different words:

"Although a general theory of the mechanism by which an underground explosion causes earthquakes to occur has not been developed, the experience gained in NTS, CNTS and STS supports the conclusion that an explosion will not trigger a large earthquake (defined as one releasing as much or more seismic energy than the explosion itself) unless the event is detonated near a fault on which an earthquake of this magnitude is imminent. This has not occurred to date."

With regard to tsunamis they said that they had "reviewed the evidence regarding the possibility of tsunami generation . . . and it agrees with the conclusion of a negligible damage risk." In both instances they were satisfied with the planned program.

Comments on ecological problems and programs were more detailed than had been possible before. They were: "The Panel continues to find [10] ecological surveillance at Amchitka adequate and finds

no reason to recommend any additional studies to those already planned. Because of the insignificant impact of MILROW on biomedical and ecological conditions, we would indeed feel that studies may well be limited to those of practical concern; i.e., sea otter protection, monitoring of human food chains, (monitoring of commercial fisheries.)

"With respect to future ecologic studies at Amchitka, we would urge that, wherever possible, scientists within Alaska itself be recruited to conduct these studies."

"The Panel urges that destructive effects of the construction group should not be overlooked in comparison with the attention directed to the explosive effect itself. Moreover, archeological remains should be carefully protected wherever possible."

The Panel's concluding statement on CANNIKIN was, "The reports on Event MILROW reinforce the Panel's view that extrapolation for the contemplated yield of CANNIKIN is warranted."

Most recently, the Ad Hoc Committee on Seismology and the Panel of Consultants met on January 12-13, 1971, principally to consider CANNIKIN. Their summary comments were these:

"1. *Seismology*

While reaffirming its earlier conclusion that there is a very small but finite possibility that a large underground nuclear explosion on Amchitka will trigger a major earth-

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quake that might in turn generate a damaging tsunami, the Panel is reassured by the results of the MILROW test. In addition, the numerous geological and geophysical studies that have been carried out in the Amchitka area during the past few years have tended to ease our concern over the possibility of such a triggered event, and in our best judgment, the proposed CANNIKIN event will be safe in this regard. . . .

"We also reiterate once again our firm opinion that no large earthquake will be triggared by the CANNIKIN event unless the same large earthquake were about to occur naturally even in the absence of an underground explosion. If a destructive tsunami were indeed to be produced, a major saving of lives might well be effected with the more adequate tsunami alert that presumably will accompany a scheduled nuclear event.

[11]

"2. *Tsunamis*

"a. *Direct effects*:

"Thus the maximum volumetric sea-surface displacement during (Milrow) was substantially less than 1 millionth of that accredited to large tsunamis. No significant alteration of these circumstances is implied by the CANNIKIN test, or any nominal extrapolation thereof. . .

~~SECRET~~

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"b. *Indirect Effects*:

"The possibility that a CANNIKIN-triggered-earthquake might generate a destructive tsunami would require the coincidence of two apparently unrelated events (and this implies) a very low probability of the type of gross sea floor motion associated with tsunamigenic earthquakes in Alaska (1964) and Chile (1960).

"3. *Hydrology*

"The geology and hydrology of Amchitka are well defined. Based on these data, the shot site for CANNIKIN was selected. Precautions were taken to avoid systems of open interconnected fractures which could allow considerable tritiated water to reach the sea within the half-life of tritium. Creditable models predicting the containment of radioactive water demonstrate that there is no potential hazard associated with radioactive water reaching the ocean. This prediction is substantiated by age-dating of the water contained in the hydrological system.

"4. *Bio-environmental*

"Over-all AEC activities, including CANNIKIN, have not and will not interfere with or modify the function of Amchitka as a National Wildlife Refuge other than to possibly enhance it through development or

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roads and facilities and providing previously unknown ecological knowledge on the biological and physical aspects of the refuge and surrounding environs. Publication of these findings in the open literature or in the single compendium should be encouraged."

[12]

The Nuclear Safety Study Group reviewed and approved the preliminary plans for transportation, emplacement, timing, arming and firing the CANNIKIN device on December 9, 1970. They recommended another study at a later date, when the device plans would be firmly established. This date has not yet been selected.

No other reviews are expected, except of course, constant review by the Lawrence Radiation Laboratory as the weapon laboratory, by the Test Manager, and by higher echelons of approval.

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2.0 *TECHNICAL DATA*

Nominal Device Yield	[deletion]
Max. Credible Yield	[deletion]
Depth of Burst (DOB)	5875 ft (1790 m)
Scaled DOB (nominal)	[deletion]
(max. cred.)	[deletion]
Shot Media:	
Volcanic breccia and andesites, Banjo Point Formation	0-1395 ft (0-425 m)
Pillow lavas and breccias, Kirilof Point Formation	1395-5030 ft (425-1534 m)
Older breccias	5030-7000 ft (1534-2135 m)
Ground Water Table	35 m (115 ft)
Distance to nearest faults	N 3300 ft (1 km) S 2000 ft (0.6 km) (suspected)
Device Laboratory	Lawrence Radiation Laboratory, Livermore, Calif.

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Supreme Court, U. S.
FILED
AUG 15 1972
MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-909

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners,

—v.—

PATSY T. MINK, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR CONSUMERS UNION OF UNITED STATES, INC., *AMICUS CURIAE*

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MICHAEL N. POLLET

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Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR CONSUMERS UNION OF UNITED STATES, INC., *AMICUS CURIAE*

Interest of *Amicus*

Amicus is a non-profit organization, chartered in 1936 pursuant to the Membership Corporations Law of the State of New York, which performs tests on consumer products and provides information and advice to the general public on goods and services. *Amicus* publishes and sells the monthly magazine CONSUMER REPORTS, which has a current circulation in excess of 2,000,000.

In addition to maintaining testing and reporting services, Consumers Union pursues the following objectives, which are excerpted from its Certificate of Incorporation, and digested in the masthead of each issue of CONSUMER REPORTS:

"To provide consumers with information and counsel on consumers goods and services, to give information on all matters relating to the expenditure of the family income, and to initiate and to cooperate with individual and group efforts seeking to create and maintain decent living standards."

As a "leading consumer-oriented investigator of products," [1] *amicus* has a real and continuing interest in obtaining for its readers and the general public the fullest possible information on the testing, use and quality of various products on the market, much of which can only be obtained from various agencies of the federal government. While the testing services performed by *amicus* are necessarily limited by available funds, federal agencies test large numbers of products on a vast scale, gathering much information, unavailable elsewhere, which would be of untold benefit to millions of consumers in the United States.

Amicus, therefore, is deeply concerned that the provisions of the Freedom of Information Act, guaranteeing public access to most agency documents, be broadly construed, and its exemptions be narrowly construed, in accordance with Congress' intent. Indeed, *amicus* was the first to bring suit seeking product testing information under the Act. See *Consumers Union of United States, Inc.* v. *Veterans Administration, et al.,* 301 F. Supp. 796 (S.D.N.Y. 1970), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971). Additionally, Consumers Union appeared as *amicus curiae* in *Getman* v. *NLRB,* 450 F.2d 670, 67[illegible]

[1] See *Consumers Union of United States, Inc.* v. *Veterans Administration, et al.,* 436 F.2d 1363, 1365 (2d Cir. 1971), dismissing appeal as moot.

n. 25 (D.C. Cir. 1971), a decision which held that courts have no equitable jurisdiction under the Freedom of Information Act to deny disclosure on grounds other than those specifically set forth in one of the Act's enumerated exemptions. See "A Big Footnote in CU v. VA," 37 CONSUMER REPORTS 338 (1972).

Amicus believes that the principles involved in this case present important questions of law and policy affecting the consumer's and the general public's right to information under the Freedom of Information Act. In particular, it takes issue with the propositions advanced by the Environmental Protection Agency (E.P.A.): that the documents in question are exempt from the Freedom of Information Act, and that the courts are barred from examining these documents simply because Agency officials in their unchecked discretion have labeled them exempt.

E.P.A. misconstrues the issues before this Court. The Petitioner argues that once an agency official has marked a document as classified or as an inter- or intra-agency memorandum, the federal courts are barred from questioning the validity of that determination. Any ruling in support of this proposition, however, would render meaningless the nine exemptions to the Act specifically enumerated by Congress, and would allow federal agencies, through convenient juxtaposition of validly classified material with non-classified matter, to bar the entire lot of materials from court inspection, and thus through classification-by-association to frustrate the purpose of full disclosure intended by Congress in enacting the Freedom of Information Act.

At issue, rather, is whether the courts may make *in camera* inspections of documents *claimed* to be privileged

for the purpose of determining whether they are indeed so privileged, either in whole or in part, and for the purpose of separating privileged materials from the non-privileged in order to compel disclosure of the latter according to the Freedom of Information Act.

ARGUMENT

I.

The Freedom of Information Act Requires That in Each *De Novo* Proceeding Under the Act, the District Court Be Satisfied That Agency Invocation of One of the Act's Exemptions Is Correct; This Is So Even if It Is Necessary for the Court to Conduct an *In Camera* Examination of the Documents in Order to Determine Whether the Privilege as Claimed Actually Exists.

Both the legislative history and the express language of the Freedom of Information Act compel the conclusion, already accepted by the courts in *Soucie* v. *David*, 448 F. 2d 1067, 1080 (D.C. Cir. 1967), and *Wellford* v. *Hardin*, 444 F.2d 21, 25 (4th Cir. 1971), that the Act's exemptions are to be narrowly construed. Sen. Rep. No. 813, 89th Cong. 2d Sess. (1965) specifically asserts that according to the Act, "all materials of the Government are to be made available to the public by publication or otherwise, unless *explicitly* allowed to be kept secret by one of the exemptions . . .".

This Senate insistence on a policy of full disclosure except in explicitly delimited cases finds authoritative reinforcement in the final wording of the Act itself. That Congress intended to define and restrict the exemptions

to disclosure is made crystal clear in subsection (c) of § 552 of the Freedom of Information Act which unambiguously states: "This section does not authorize withholding of information or limiting the availability of records to the public; except as *specifically* stated in this section." 5 U.S.C. § 552(c) (emphasis added). Words like *specifically* and *explicitly* play, of necessity, an important role in the construction of the Act's exemptions. In *Bristol-Myers Co. v. Federal Trade Commission*, 424 F.2d 935 (D.C. Cir. 1970), the court of appeals noted with displeasure that the district judge had failed to examine the disputed documents, "and to explain the specific justification for withholding particular items," (424 F.2d at 938), thus raising substantial difficulties of interpretation for the appellate court.

A. *Blanket Classification of Materials Does Not of Itself Satisfy the Requirements of Exemption One. The Burden Is Therefore on the E.P.A. to Demonstrate Exemption of Each Particular Unit of Information Sought by Respondents.*

Exemption One protects from disclosure "matters . . . *specifically* required by Executive order to be kept secret in the interest of the national defense or foreign policy" (emphasis added). 5 U.S.C. § 552(b)(1). The E.P.A. has throughout this case relied on Executive Order 10501 as basis enough for fulfilling the requirements posed by the word "specifically" in the first exemption. This order, however, requires *blanket* classification of documents:

> "The document . . . shall bear only one overall classification, notwithstanding that pages, paragraphs, sections or components thereof bear different classifications." As amended, 3 C.F.R. 292 (1971), 50 U.S.C. § 401 (Supp. 1972).

The court of appeals below ordered the district court to find just such pages, paragraphs, sections and components which the E.P.A. here seeks to protect from disclosure, and to release those which it deems non-secret and separable from the secret remainder. That such material should remain undisclosed would clearly be contrary to Congress' intent in enacting the Freedom of Information Act. It has admittedly not been "specifically required by Executive order to be kept secret," but has been classified "Secret" by association only. It would be contrary to the mandate of Congress to broaden Exemption One, as the E.P.A. here contends must be done. A leading commentator on the Freedom of Information Act has stated:

> "Courts that usually constitute themselves working partners with legislative bodies to produce sensible and desirable legislation may follow their accustomed habits in *narrowing* the ascertainable meaning of the words of an exemption, but . . . they are restricted in following those habits in broadening that meaning." Davis, "The Information Act: A Preliminary Analysis," 34 U. of Chi. L. Rev. 761, 783-84 (1967).

The E.P.A. in its brief to this Court (p. 9) argues that Congress intended by Exemption One to accord broad respect for the Executive's decision as to classification. *Broad,* however, does not mean *unlimited.* In *New York Times Co.* v. *United States,* 403 U.S. 713 (1971), this Court found the government's claim for "broad respect" and privilege to be unfounded. In a concurring opinion joined by Mr. Justice White, Mr. Justice Stewart stated:

> "[T]he only effective restraint upon executive policy and power in the areas of national defense and inter-

national affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government." (403 U.S. at 728).

Though the court need not inspect documents *in camera* if government agencies describe their relevant features sufficiently to satisfy the court that a claim of privilege is justified, the court must be free to do so, even when the government asserts that public disclosure would be harmful to the national defense or foreign policy. *Soucie* v. *David, supra.* *Soucie* involved claims for documents concerning the federal government's program for the development of the S.S.T., clearly a matter of importance both to national defense *and* foreign policy. The court there held nonetheless that the Freedom of Information Act, by requiring a trial *de novo* in which the burden rests on the government to prove that an appropriate and specific executive order has been made, clearly rejects any hint of the traditional "deference to administrative determinations" (448 F.2d at 1077).

Each proceeding under the Freedom of Information Act is required to be *de novo* "in order that the ultimate decision as to the propriety of the agency's action is made by the court," and to "prevent it from becoming meaningless judicial sanctioning of agency discretion." Sen. Rep. No. 813, *supra,* p. 8. The danger of leaving such ultimate decisions up to an executive agency has been recognized elsewhere by this Court. As Mr. Justice Powell stated for the Court in *United States* v. *U. S. District Court for the Eastern District of Michigan,* 40 U.S.L.W. 4767 (June 19, 1972), "executive discretion may yield too readily to pressures" in seeking to maintain national security. The courts,

together with Congress, must act as required by our balance-of-powers system to offset that executive tendency and its concomitant threat to our constitutional scheme of government.

B. *Factual Materials Do Not by Definition Fall Within the Explicit Coverage of Exemption Five. The Burden Is Therefore on the E.P.A. to Demonstrate Exemption of the Particular Factual Materials at Issue.*

The E.P.A. argues (Petitioner's brief, p. 39) that the fifth exemption was intended by Congress to bar disclosure of factual as well as nonfactual material in order to guarantee frank discussion of policy matters by agency officials. In light of the strong Congressional purpose to promote disclosure evidenced by passage of the Freedom of Information Act, however, it is clear that factual material was *not* intended to fall within the explicit coverage of the fifth exemption, which protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency", 5 U.S.C. § 552(b)(5). *Consumers Union* v. *Veterans Administration,* 301 F. Supp. at 805. The E.P.A. fails to realize that disclosure of purely factual material would in no way impinge on the guarantee of frank policy-matter discussion. *Boeing Airplane Co.* v. *Coggeshall,* 280 F.2d 654, 661-62 (D.C. Cir. 1960).

The E.P.A.'s argument, furthermore, expands fifth exemption policy to a point dangerously in conflict with the purpose of the Freedom of Information Act:

> "The problem is not the essential soundness of the policy but the inevitable temptation of a governmental litigant to give it an expansive interpretation in re-

lation to the particular records in issue." *Ackerly* v. *Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969).

Recognizing this problem, the court in *Machin* v. *Zuckert*, 316 F.2d 336 (D.C. Cir. 1963), *cert. den.* 375 U.S. 896 (1963), required the Air Force, despite a claim of privilege, to produce "factual findings" included in a particular Air Force report dealing with an airplane crash, and containing certain classified information about the plane and its mission at the time of the crash, because the Air Force had failed to demonstrate to the court's satisfaction that disclosure might be dangerous. Thus, if in a given situation nondisclosure is crucial as to certain factual materials, the burden is on the government agency to so demonstrate to the court. *United States* v. *Reynolds*, 345 U.S. 1, 9 (1953); *Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318, 331-32 (D.D.C. 1966).

In a desperate attempt to prevail even if the Court should find that the fifth exemption *does* permit disclosure of factual materials, the E.P.A. cites the wording of H.R. Rep. No. 1497, 89th Cong. 2d Sess. (1965) (Petitioner's Brief, p. 11), which states that the only disclosable materials are those which would *routinely* be disclosed through discovery to a private party in litigation with the agency. Neither Sen. Rep. No. 813, *supra*, nor the final wording of the Act itself includes that qualifying word, however. Indeed, the House Committee only wrote this limitation and others like it into its report when it was subjected to outside pressure to restrict the Senate bill (Davis, *supra*, at 805); the House actually passed the same bill as the Senate. Clearly, the wording of the statute itself, passed by both houses of Congress, must prevail over that of a

committee report from one house which was never voted upon or even considered by the other house. *United States* v. *Lincoln Rochester Trust Co.*, 297 F.2d 891 (2d Cir. 1962), *cert. den.* 369 U.S. 887 (1962). Indeed, the district court in *Consumers Union* v. *Veterans Administration, supra,* in choosing between the Senate and House Committee interpretations of the Freedom of Information Act, preferred the former, "since its report was before both houses of Congress . . . is more consistent with the purpose of the Act and . . . avoids a possible internal contradiction." 301 F. Supp. at 801. *Accord, Getman* v. *NLRB, supra,* at 673 n. 8.

The district court in *Consumers Union* v. *Veterans Administration, supra,* defined the scope of the fifth exemption as follows:

> "To determine if the requirements of the 5th exemption are met, this court must ask if the records sought are inter- or intra-agency memoranda or letters which would not be available to *any* party in *any* litigation in which the agency having the records might now be involved. The fulcrum of this test is discovery practices as regulated by the courts, not discovery as it is practiced by the government. . . ." *Id.* at 804.

It is respectfully submitted that the documents sought by Respondents here clearly do not satisfy the above test which must be met to justify exemption.

II.

The District Court Is Competent to Conduct an *In Camera* Inspection of Documents Claimed to Be Blanketly Exempt for the Purpose of Separating Privileged Materials From Non-privileged Materials, and Compelling Disclosure of the Latter.

The court of appeals below ordered the district court on remand to examine the documents in question, looking to possible separation of them for purposes of disclosure and nondisclosure. In doing so, it adhered to the rule expounded in *Soucie* v. *David, supra,* that according to the Freedom of Information Act, "factual information may be protected only if it is inextricably intertwined with policy-making processes" (448 F.2d at 1077-78). In response, the E.P.A. proffers before this Court two weak and unpersuasive arguments. First, it maintains (Petitioner's brief, p. 39) that a fact-policy distinction as regards Exemption Five is unsound because fact portions are virtually certain to be inextricably bound into policy portions. If this were so in any given case, however, the federal agency involved would clearly risk nothing by an *in camera* examination of the documents; the court, unable to separate, would be unable to disclose.

Secondly, the E.P.A. maintains (Petitioner's Brief, p. 28) that the federal courts, "are not well-equipped to make the decisions that the court of appeals has required the district court to make in this case . . . whether a document requires a top secret or secret classification and whether that classification can safely be removed or changed." Though the E.P.A. claims that such decisions

both as to documents and as to parts of documents are prerogatives peculiarly within the province of the Executive, the courts have often recognized that there is no lack of judicial power or expertise to make that determination.

This Court, for example, by its decision in *New York Times Co.* v. *United States, supra,* determined that it is appropriate for federal judges to consider whether various portions of a classified document ought to be released. More specifically, this Court responded to an argument very similar to that advanced here by the E.P.A. in *United States* v. *U. S. District Court for the Eastern District of Michigan, supra.* Mr. Justice Powell in speaking for the Court stated:

> "We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive or uncomprehending of the issues involved in domestic security cases . . . If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance. . . . The investigation of criminal activity has long involved imparting sensitive information to judicial officers who have respected the confidentialities involved. Judges may be counted upon to be especially conscious of security requirements in national security cases." 40 U.S.L.W. at 4768.

As regards the Freedom of Information Act specifically, the Fourth Circuit held in *Wellford* v. *Hardin, supra,* that

it is a violation of the Act to withhold a document on the ground that parts of it are exempt and parts not exempt; "suitable deletions" should be made by the court so as to disclose the nonexempt remainder of the document. See also *Machin* v. *Zuckert, supra.* Similarly, in *Soucie* v. *David, supra,* in discussing a report on government activities in relation to the S.S.T., the court stated that inspection of the report would enable the district judge on remand "to delete any privileged matter, so that the remainder may be disclosed in accordance with the policies of the [Freedom of Information] Act" (448 F.2d at 1079).

In light of these precedents, *amicus* respectfully submits that the E.P.A. contention that courts cannot be entrusted with the task of *in camera* review here plainly has no basis in law. It is entirely proper and consistent with the role of the judiciary under our constitutional system for the courts to undertake such inspections, "keeping in mind the issues of the case, the nature and importance of the interests supporting the claim of privilege, and the fundamental policy of free societies that justice is usually promoted by disclosure rather than secrecy." *Boeing Airplane Co.* v. *Coggeshall, supra,* at 662.

Furthermore, the option to itself voluntarily separate commingled exempt and non-exempt materials always remains open to a federal agency. The Administrative Conference of the United States, entrusted with the power to adopt recommendations which it considers appropriate for improving administrative procedures in federal agencies, has even adopted the following standard as part of its "Principles and Guidelines for Implementation of the Freedom of Information Act":

"Where a requested file or record contains exempt information that the agency wishes to maintain confidential, it should offer to make available the file or a copy of the record with appropriate deletions if this can be done without revealing the exempt information." *1970-71 Annual Report of the Administrative Conference of the United States,* at 53.

III.

The Authority of the Courts to Examine *In Camera* Documents Claimed to Be Privileged Either in Whole or in Part, and to Separate Such Documents Into Privileged and Non-privileged Portions for the Purpose of Disclosure Under the Freedom of Information Act Is of Utmost Importance to Consumers and to the General Public.

The public interest in obtaining information such as that sought here by petitioners can hardly be denied. "The public's need for information is especially great in the field of science and technology, for the growth of specialized scientific knowledge threatens to outstrip our collective ability to control its effect on our lives." *Soucie* v. *David, supra,* at 1080. To recognize this truth the Court need only look at a hypothetical situation, one highly similar to the one at hand. Suppose, after a nuclear test such as Cannikin, Respondents, or *amicus* itself,[2] were to seek disclosure of agency reports showing the resulting rela-

[2] The concern of *amicus* in this matter is amply demonstrated by the numerous articles in CONSUMER REPORTS on the effect of radiation from atomic testing on foods normally included in the human diet. See 27 CONSUMER REPORTS 139, 446 (1962); 28 CONSUMER REPORTS 190, 448 (1963).

tive amounts of radioactive matter in various organic food products.

Clearly, the consuming public would have a valid and, indeed, urgent interest in attaining disclosure of such reports. Yet the governmental agencies involved could well advance the same arguments for nondisclosure that the E.P.A. here seeks to assert. That this is not a fanciful supposition is borne out in a recent article in the New York Times, as follows:

> "In the past, the secrecy system has often been abused to the point that the military's purchases of peanut butter and paint have been known to be classified confidential." Graham, "Pentagon Papers Trial: A Major Test of First Amendment," *New York Times*, July 26, 1972, p. 14.

See also *Consumers Union* v. *Veterans Administration*, 301 F. Supp. 796, where the defendant federal agency strenuously opposed the release of hearing aid test scores, hardly a matter urgently in need of "confidential" classification.

In both the real and the hypothetical cases, because the Freedom of Information Act was intended to benefit the public generally, "it is primarily the effect on the public rather than on the person seeking the records that must be weighed." *Consumers Union* v. *Veterans Administration*, 301 F. Supp. at 806.

The courts, furthermore, in weighing the public interest, must look realistically at the state of administrative compliance with the Act and cooperation with its aims. As one noted consumer advocate has stated:

> "After three months of exploring the frontiers of the Freedom of Information policy of several federal agencies, . . . I have reached a disturbing conclusion: government officials at all levels in many of these agencies have systematically and routinely violated both the purposes and specific provisions of the law. These violations have become so regular that they seriously block citizen understanding and participation in government. Thus the Act, designed to provide citizens with tools of disclosure, has been forged into a shield against citizen access. There is a prevailing, official belief that these federal agencies need not tolerate searching inquiries or even routine inquiries that appear searching because of their infrequency." Nader, "Freedom from Information: The Act and the Agencies," 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 1, 12 (1970).

See also Davis, *supra,* at 805, and at 761, where he points out that all of the federal agencies opposed passage of the Freedom of Information Act.

Few consumers or consumer groups can afford to sue in response to such administrative violations. Unless this Court clearly and unequivocally affirms the decision of the court below, administrative recalcitrance in the federal agencies may well, as described above, frustrate the consumer, both as an individual and as a class, in the rightful pursuit of government information and may well render meaningless both the letter and the spirit of the Freedom of Information Act.

CONCLUSION

The E.P.A. erroneously seeks to deny the federal judiciary its authority, under the Freedom of Information Act, to examine *in camera* materials claimed to be exempt, and to disclose portions thereof which it deems to be non-privileged according to the requirements of that Act. It is respectfully urged that such a denial cannot stand, and that this Court should affirm the decision of the Court of Appeals for the District of Columbia Circuit.

August, 1972.

Respectfully submitted,

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*Attorneys for *amicus curiae* gratefully acknowledge the assistance of Mrs. Helen Rosenberg, second year student at New York University Law School, in the preparation of this brief.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-909

ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS,

v.

PATSY T. MINK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

This reply brief is submitted to clarify two matters raised in respondents' brief: (1) The relationship between the discovery proceedings held in the *Nuclear Responsibility* litigation (which sought to enjoin the Cannikin test) and this action under the Freedom of Information Act, and (2) the effect of the new Executive Order, No. 11652, on the issue in this case as to Exemption 1 of the Act.

I. RELATIONSHIP TO THE NUCLEAR RESPONSIBILITY CASE

Respondents argue that the treatment of six of the nine documents here involved in *Committee for Nuclear Responsibility, Inc.* v. *Seaborg*, 463 F. 2d 783,

788, 796 (C.A.D.C. 1971) (hereinafter referred to as the *CNR* case), has an important bearing upon the disposition of this case.[1] They argue that the judicial examination of some of the documents in that case robs this case of significance, constitutes an acquiesence by the government in the practice of *in camera* inspection, and demonstrates the feasibility of court screening of documents for the purpose of releasing portions found to be "non-secret components."

In the *CNR* case, which was a suit brought by environmental groups to enjoin the proposed Cannikin underground nuclear test, the plaintiffs sought discovery of government reports relating to Cannikin in order to establish their claim that the AEC had failed to give adequate consideration to environmental issues. See 463 F. 2d 783–788 (C.A.D.C.). The court of appeals held that "[*i*]*n camera* inspection of allegedly privileged documents * * * is a procedure approved by the courts *at least where, as here, military and diplomatic secrets are not at issue.*" 463 F. 2d 788, 792 (C.A.D.C.) (emphasis added). The court stressed that the district court would examine only documents from which the gov-

[1] The record in this case does not contain information concerning the subsequent treatment of the nine documents here involved. Factual statements relating either to government actions or to court orders in the *CNR* case which have affected the availability or classification status of some of the nine documents are sprinkled throughout the briefs. In order to assist the Court in its understanding of the current factual situation, a document-by-document summary is included as Appendix A to this reply brief, *infra*, pp. 11–15.

ernment previously had excised "any and all materials reflecting military and diplomatic secrets as distinguished from possible environmental hazards of the test" (463 F. 2d at 790, 792; see also the district court order reprinted at 795); and this procedure was in fact carried out.[2]

The failure of the government to seek review by certiorari of the rulings by the court of appeals in the *CNR* discovery proceedings was not an acquiesence by the government in the practice of *in camera* review of allegedly privileged material. The question arose in discovery proceedings in which a civil litigant seeking to enjoin the test had established a need for certain materials in the government's possession. The principal objective of the government in the *CNR* case was to allow the Cannikin test to proceed. The government was successful in opposing an injunction of the test, and its tactical decision not to seek review on a procedural point did not constitute a waiver of any position asserted in this separate litigation.

More fundamentally, however, the decision in the *CNR* case does not support Respondents' position. The three most important and sensitive documents in this case—the Irwin memorandum [Irwin Affidavit, para. 5A], the Irwin committee report [para. 5B], and the Kissinger report [para. 5B–2]—were neither produced nor examined in that litigation. Moreover, *no*

[2] See the transcript of the *in camera* proceedings held October 30, 1971, before the district court in the *CNR* case (D.D.C., Civil Action No. 1346–71), p. 2, which we are lodging with the Clerk.

classified material was examined by the district court in the CNR case.[3]

In this case, unlike the *CNR* litigation, the court of appeals directed the district court to "take evidence on whether, and to what extent," the withheld documents contain "non-secret components [which] are separable from the secret remainder and may be read separately without distortion of meaning * * *" (Pet. App. A, 27). This task would require the district court to undertake two functions which were avoided in the *CNR* case: first, *in camera* inspection of classified documents; and second, judicial determination of whether all or part of a document shown to involve a major test of a military weapon was properly classified as secret. These are functions which are committed to executive discretion in the absence of any indication that the classification was arbitrary or capricious. *Epstein* v. *Resor,* 421 F.2d 930, 933 (C.A. 9), certiorari denied, 398 U.S. 965; *Moss* v. *Laird* (D.D.C., Civil Action No. 1254–71, decided December 7, 1971).

Finally, we note that the district court's examination in the *CNR* case of the unclassified materials in four documents to determine whether they fell within the evidentiary privilege for intra-executive advice provides independent corroboration for the statement in the Irwin affidavit in this case that these documents "were prepared and used solely for transmittal to the Presi-

[3] See Appendix A of this brief (*infra*, pp. 11–15) a description of the documents involved in this case and actions taken concerning them; see Appendix B (*infra*, p. 16) for a table summarizing these actions.

dent as advice and recommendations and set forth the views and opinions of the individuals and agencies preparing the documents so that the President might be fully apprised of varying viewpoints * * *" (App. 28-29).[4] An *in camera* inspection of documents which an affidavit establishes are at the core of an evidentiary privilege or of an exemption to the Freedom of Information Act is unnecessary as well as unwise since it threatens the purpose of the privilege itself. But where an inspection for the limited purpose of determining whether a claim of privilege is arbitrary has already occurred, the Court may obtain some assurance from the fact that the documents examined were found to comport fully to the description of them contained in the Irwin Affidavit.[5]

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[4] The court found that three documents consisted in their entirety of privileged intra-executive advice and recommendations: Ruckelshaus letter, Train letter, and David letter (all three referred to in para. 5c of the Irwin affidavit), and the fourth document, the CEQ memorandum (para. 5b–5 of Irwin affidavit), was found to contain both intra-executive advice and purely factual material. Portions falling into the former category were excised and the remainder of the document was made publicly available and is no longer in issue.

The court's treatment of these materials thus also serves to confirm the correctness of the government's claim that these materials fall squarely under Exemption 5 of the Freedom of Information Act.

[5] Respondents also argue that it is "incongruous" to interpret the first exemption of the Act as including material classified pursuant to executive order when it does not include material classified as "Restricted Data" pursuant to the specific provisions of the Atomic Energy Act, 42 U.S.C. 2014(y), 2161, 2162. Respondents' Brief, p. 28, n. 23. If there is an incongruity, it is one that is built into the Freedom of Information Act. The first exemption of the Act, 5 U.S.C. 552(b)(1), cov-

II. EFFECT OF THE NEW EXECUTIVE ORDER

1. Respondents assert that the new Executive Order No. 11652, which on June 1, 1972 superseded Executive Order No. 10501 under which the documents at issue in this case were classified, drains this case of importance and "effectively" moots it. Respondents' Brief, p. 28. For that proposition, respondents advance the following argument. They claim that the new Executive order has "ratified" the decision of the court of appeals below by adopting the requirement in its Section 4(A) that a document originated after June 1, 1972 and classified under the new Executive order be marked "to the extent practicable" to show "which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use." Respondents say that the documents at issue here have not been reexamined under the provisions of the new Order, and that if they were the segment-by-segment classification review ordered by the court of appeals would have to be performed. Finally, respondents suggest that the

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ers matters "specifically required *by Executive order* to be kept secret in the interest of the national defense or foreign policy." Material which Congress by statute has prohibited from disclosure is not dealt with under this exemption. The third exemption, however, refers to matters that are "specifically exempted from disclosure by statute," language that clearly includes documents classified pursuant to the Atomic Energy Act. Although this exemption is applicable to some of the documents involved in this case, it has not been asserted by the government.

opinion of the court of appeals below may fairly be characterized as requiring only that the executive examine the documents segment-by-segment for declassification purposes, without an *in camera* review of its determinations by the district court.

2. The new Executive order clearly does not drain this case of importance. Large quantities of documents—including those at issue in this case—were classified under Executive Order 10501, some as recently as May 1972, and they remain in government files. The drafters of the new Executive order were acutely aware of the problems created by this vast amount of material, and made provisions for its handling which went in their view as far toward promoting the policy of the new Order to make more information available to the public as could be done without imposing an unsustainable burden on the agencies possessing this material. The new Order does not require the reclassification of every document classified under the old order, just as if it had been originated after June 1, 1972. Instead, it provides in Section 5(D) that (1) material subject to scheduled declassification under the old order (Group 4 material) will be subjected to automatic downgrading and declassification under the General Declassification Schedule established by Section 5(A) of the new Order, and (2) all other 10501 material will be treated as if exempted from the General Declassification Schedule, and will be subject to the manda-

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tory review provisions of Section 5(C) of the new Order. Under Section 5(C), classified documents more than 10 years old must be subjected (on request by another agency or a member of the public) to a substantive classification review by the originating agency to determine whether they currently fall into one of the four exemption categories set out in Section 5(B) of the Order. If the document does not fall into one of those categories on review it must be declassified. If it does, the document is to be so marked and a declassification date set if possible.

The documents involved in this case are less than 10 years old and the mandatory review provision of the new Order would therefore be inapplicable. Even if the documents were more than 10 years old, a paragraph-by-paragraph review would not be required by the Order as the respondents claim. The Order requires only that a determination be made as to whether there is any information or material that would qualify the document for exemption from the General Declassification Schedule under Section 5(B) of the new Order. Section 4(A) of the New Order is not applicable. Section 4(A) is a marking requirement intended to apply where new documents are classified under the new Order. Its primary purpose, as is indicated by the quotation on page 30 of the respondents' brief from the President's statement at the time the new Order was issued, is to prevent unnecessary classification of

new documents when they incorporate innocuous portions of previously classified documents. It is not intended to require a paragraph-by-paragraph review by either the executive or a court of previously classified documents with a view to public release of portions determined upon review to be innocuous.

3. The respondents suggest (Respondents' Brief, p. 32) that the court of appeals meant only to require the government to review the documents itself. Part III of that Court's opinion indicates, contrary to respondents' assertion, that an *in camera* inspection clearly was directed by the court of appeals (Pet. App. A, p. 28).

Respondents' effort to remove from this case the important issue of who is intended by the Freedom of Information Act to make the decisions as to the necessity of classification under the standards of the applicable Executive orders is some indication of the difficulty of their position. The new Executive Order and the first exemption to the Freedom of Information Act intend to keep that decision where it is in cases like the present one—with the executive branch. Where an affidavit has clearly established that classified documents fall in the very core area of the President's responsibilities in the national defense and foreign policy area, the Freedom of Information Act did not intend a court to examine the classified documents itself with a view to second guessing the executive on the necessity of classification.

CONCLUSION

For the foregoing reasons, and for those set forth in our main brief, the judgment of the court of appeals should be reversed and the judgment of the district court reinstated.

Respectfully submitted.

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NOVEMBER 1972.

APPENDIX A

Status of Documents in Issue

1. *Irwin Memorandum* [para. 5A].[1] This memorandum was prepared for the President by Under Secretary of State John N. Irwin, II on July 17, 1971 in his capacity as Chairman of the Under Secretaries Committee of the National Security Council. It was separately classified as Top Secret and Restricted Data at that time and presently is classified Top Secret and Formerly Restricted Data. It was not examined by the district court in the *CNR* case. The government contends that this document is exempt from nondisclosure under both the first and the fifth exemptions of the Freedom of Information Act.

2. *Report of the Under Secretaries Committee* [para. 5B]. This National Security Council document, dated July 17, 1971, is the formal report of the Under Secretaries Committee concerning the proposed Cannikin test. The report, which is 32 pages long, was separately classified as Top Secret and Restricted Data. It was not examined by the district court in the *CNR* case and retains its original classification. The government contends that the report is exempt from disclosure under both the first and the fifth exemptions of the Freedom of Information Act. Five sets of documents, 3 through 7 below, were attached to this report in the form in which it was transmitted to the President.

3. *Seaborg letter and attachments* [para. 5B–1]. This letter of April 14, 1971, and its attachments, from then Chairman Seaborg of the Atomic Energy Commission to Chairman Irwin of the Under Secre-

[1] Bracketed references are to parts of paragraph 5 of the Irwin Affidavit (App. 28–29).

taries Committee was separately classified as Secret and as Restricted Data. The classification of this material was reviewed by the AEC in connection with the request for its discovery in the *CNR* case. As part of this review all classified information was excised from the material and the remaining declassified portions were examined by the district court *in camera*. Civil Action No. 1346–71, transcript of October 30, 1971 p. 3 (hereafter "Oct. 30 Tr."). The district court ordered that portion of the unclassified version which had a bearing on environmental matters to be made available to the plaintiffs and this material was then released to the public. The government contends that the undisclosed portions of the document, now separately classified as Secret and as Restricted Data, are immune from disclosure under both the first and fifth exemptions of the Freedom of Information Act.

4. *Report of the NSC Defense Program Review Committee (Kissinger Report)* [para. 5 B–2]. This report was prepared at the request of the National Security Council for the use of the Under Secretaries Committee and transmitted under a cover memorandum of Dr. Henry Kissinger to Under Secretary Irwin dated June 16, 1971. The Report, which was separately classified as Top Secret and as Restricted Data, continues to be so classified, ~~as Restricted Data.~~ This Report was not made available to or examined by the district court in the *CNR* case.

5. *AEC Environmental Impact Statement on Cannikin Project* [para. 5 B–3]. This document, dated June 1971, was prepared by the U.S. Atomic Energy Commission in compliance with the requirements of the

National Environmental Policy Act. It has been publicly available since its completion and is not in controversy here.

6. *Transcript of AEC Briefing on Cannikin to Under Secretaries Committee* [para. 5 B–4]. This document is an edited transcript of remarks by five AEC briefers given orally to the Under Secretaries Committee on December 15, 1970. The transcript was separately classified as Secret and as Restricted Data in 1970, but its classification was reviewed in connection with the discovery proceedings in the *CNR* case. The classification of two segments, containing the remarks of Dr. Glenn Seaborg and of Dr. Michael May, was confirmed as a result of this review and these segments were not made available to the district court in that case. The other three segments, containing the remarks of Dr. M. L. Merrit, Dr. W. G. Van Dorn, and Dr. J. W. Hadley, were declassified after this review and were released to the public except for some conclusory matter on the final page of Dr. Hadley's segment. The segment involving Dr. Merritt is reprinted in part as Appendix D to Respondents' Brief. The declassified portions are no longer in controversy here, but the government contends that the undisclosed portions are immune from disclosure under both the first and the fifth exemptions of the Act.

7. *CEQ Memorandum on Potential Environmental Hazards of Cannikin* [para. 5B–5]. This memorandum to Mr. Irwin from the Council on Environmental Quality, dated December 2, 1970, was not separately classified. It was examined *in camera* by the district court in the *CNR* discovery proceedings and portions of it dealing with environmental matters and not containing

policy advice were ordered disclosed to the plaintiffs in that litigation. The disclosed portion has been made available to the public and is reprinted as an appendix to Respondents' Brief in Opposition (pp. 23–28). The government contends that the undisclosed portions fall within the fifth exemption of the Act. No first exemption claim is made with respect to this material.

8. *Ruckelshaus Letter* [para. 5C]. This letter of Mr. William D. Ruckelshaus of the Environmental Protection Agency to the Under Secretaries Committee, dated July 15, 1971, was apparently classified as Top Secret and as Restricted Data because it was physically attached to classified material. The letter was subsequently declassified by EPA and AEC. The district court in the *CNR* discovery proceedings examined the letter and concluded that it was "intra-executive" advice which was privileged from disclosure. Oct. 30 Tr., p. 13. The government claims that this letter is immune from disclosure under the fifth exemption of the Act. No first exemption claim is presented with respect to this letter.

9. Train Letter [para. 5C]. This document of July 6, 1971 was addressed to Under Secretary Irwin and signed by Mr. Russell E. Train, Chairman, Council on Environmental Quality. It was apparently classified as Top Secret and as Restricted Data only because it was attached to the Under Secretary's report. Since the Train letter, when detached from the Irwin report, does not contain classified material, it was made available to the district court in the *CNR* case. It was described by the district court as containing "32 words and one date" and "no environmental information of any sort," and was not ordered disclosed. Oct. 30 Tr., pp. 13–14. The

government contends that the Train letter is exempt from disclosure only under the fifth exemption of the Act.

10. *David Letter* [para. 5C]. This letter from Dr. Edward E. David, Jr., Director of the Office of Science and Technology, to the Under Secretaries Committee, dated July 9, 1971, was separately classified as Top Secret and as Restricted Data. A portion of the letter was examined by the district court in the *CNR* litigation after removal of all information which the Office of Science and Technology determined was classified. The district court, stating that the remaining material "reflects intra-executive advisory opinions and recommendations whose confidentiality contributes substantially to the effectiveness of government decision-making processes," did not order disclosure. Oct. 30 Tr., p. 12. The government contends that this letter is protected under both the first and fifth exemptions of the Act.

A tabular presentation of this information concerning the present status of the ten documents is reprinted on the following page. In general, it follows the form of the table in Respondents' Brief (p. 18a) but contains additional material.

APPENDIX B

Irwin Affidavit Reference	Item	Description	Publicly Available	First Exemption Invoked	Fifth Exemption Invoked	Already Reviewed *in camera* in CNR Case	Made Available on Discovery in CNR Case
Para. 5A	1.	Irwin Cover Memo (July 17, 1971)	No	Yes	Yes	No	No.
Para. 5B	2.	Report of Irwin Committee (July 17, 1971)	No	Yes	Yes	No	No.
Para. 5B1	3.	AEC-Seaborg Letter (April 14, 1971)	Parts	Parts [2]	Parts [2]	Yes (unclassified portions only)[1]	In part only.
Para. 5B2	4.	Kissinger Report (June 16, 1971)	No	Yes	Yes	No	No.
Para. 5B3	5.	Cannikin Environmental Impact Statement	Yes	No	No		
Para 5B4	6.	AEC Briefing Transcript (Seaborg, May, Merritt, Van Dorn, Hadley) (December 15, 1970).	Parts	Parts [2]	Parts [2]	Yes (unclassified portions only)[1]	In part only.
Para. 5B5	7.	CEQ Memorandum (December 2, 1970)	Parts	No	Parts [2]	Yes (with portions deleted)	In part only.
Para. 5C	8.	Ruckelshaus Letter (July 15, 1971)	No	No	Yes	Yes [3]	No.
Para. 5C	9.	Train Letter (July 1, 1971)	No	No	Yes	Yes [3]	No.
Para. 5C	10.	David Letter (July 9, 1971)	No	Yes	Yes	Yes (unclassified portions only) [1]	No.

[1] The classification of these documents was reviewed in connection with the discovery proceedings in the *CNR* case. The district court examined only portions of the documents, after classified material was removed by the government. This action amounted to a partial declassification of the documents in question.

[2] The government contends that the unreleased portions of these documents are protected from disclosure under the Freedom of Information Act, 5 U.S.C. 552(b). The released portions are not in issue.

[3] The submission of these documents on *in camera* inspection amounted to a declassification of the relevant materials.

U.S. GOVERNMENT PRINTING OFFICE: 1972

(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ENVIRONMENTAL PROTECTION AGENCY ET AL. *v.* MINK ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71-909. Argued November 9, 1972—Decided January 22, 1973

Respondent Members of Congress brought suit under the Freedom of Information Act of 1966 to compel disclosure of nine documents that various officials had prepared for the President concerning a scheduled underground nuclear test. All but three were classified as Top Secret and Secret under E. O. 10501, and petitioners represented that all were interagency or intra-agency documents used in the Executive Branch's decisionmaking processes. The District Court granted petitioners' motion for summary judgment on the grounds that each of the documents was exempt from compelled disclosure by 5 U. S. C. § 552 (b)(1) (hereafter Exemption 1), excluding matters "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," and § 552 (b)(5) (hereafter Exemption 5), excluding "inter-agency or intra-agency memorandums or letters which would not be available by law to a party . . . in litigation with the agency." The Court of Appeals reversed, concluding (a) that Exemption 1 permits nondisclosure of only the secret portions of classified documents but requires disclosure of the nonsecret components if separable, and (b) that Exemption 5 shielded only governmental "decisional processes" and not factual information unless "inextricably intertwined with policy-making processes." The District Court was ordered to examine the documents *in camera* to determine both aspects of separability. *Held:*

1. Exemption 1 does not permit compelled disclosure of the six classified documents or *in camera* inspection to sift out "non-secret components," and petitioners met their burden of demonstrating that the documents were entitled to protection under that exemption. Pp. 5–11.

Syllabus

2. Exemption 5 does not require that otherwise confidential documents be made available for a district court's *in camera* inspection regardless of how little, if any, purely factual material they contain. In implying that such inspection be automatic, the Court of Appeals order was overly rigid; and petitioners should be afforded the opportunity of demonstrating by means short of *in camera* inspection that the documents sought are clearly beyond the range of material that would be available to a private party in litigation with a Government agency. Pp. 11–20.

464 F. 2d 472, reversed and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, BLACKMUN, and POWELL, JJ., joined. STEWART, J., filed a concurring opinion. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined. DOUGLAS, J., filed a dissenting opinion. REHNQUIST, J., took no part in the consideration or decision of the case.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-909

Environmental Protection Agency et al., Petitioners, *v.* Patsy T. Mink et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January 22, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

The Freedom of Information Act of 1966, 5 U. S. C. § 552, provides that government agencies shall make available to the public a broad spectrum of information but exempts from its mandate certain specified categories of information, including matters that are "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy," § 552 (b)(1), or are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," § 552 (b)(5). It is the construction and scope of these exemptions that are at issue here.

I

Respondents' lawsuit began with an article that appeared in a Washington, D. C., newspaper in late July 1971. The article indicated that the President had received conflicting recommendations on the advisability of the underground nuclear test scheduled for that coming fall and, in particular, noted that the "latest recommendations" were the product of "a departmental under-secretary committee named to investigate the controversy." Two days later, Congresswoman Patsy

Mink, a respondent, sent a telegram to the President urgently requesting the "immediate release of the recommendations and reports by inter-departmental committee . . . ." When the request was denied, an action under the Freedom of Information Act was commenced by Congresswoman Mink and 32 of her colleagues in the House.[1]

Petitioners immediately moved for summary judgment on the grounds that the materials sought were specifically exempted from disclosure under subsections (b)(1) and (b)(5) of the Act.[2] In support of the motion, petitioners filed an affidavit of John N. Irwin, II, the Undersecretary of State. Briefly, the affidavit states that Mr. Irwin was appointed by President Nixon as Chairman of an "Undersecretaries Committee," which was a part of the National Security Council system organized by the President "so that he could use it as an instrument for obtaining advice on important questions relating to our national security." The Committee was directed by the President in 1969 "to review the annual underground nuclear test program and to encompass within this review requests for authorization of specific scheduled tests."

[1] A separate action was brought to enjoin the test itself. *Committee for Nuclear Responsibility, Inc.* v. *Seaborg* (D. D. C., Civ. Action No. 1346–71). After adverse decisions below, plaintiffs in that case applied for an injunction in this Court. On November 6, 1971, we denied the application, *Committee for Nuclear Responsibility, Inc.* v. *Schlesinger*, 404 U. S. 917, and the test was conducted that same day.

It should be noted that in the District Court respondents stated that they "have exhausted their administrative remedies [and] . . . have complied with all applicable regulations." Petitioners did not contest those assertions.

[2] Petitioners also moved for dismissal of the suit insofar as respondents sought disclosure of the documents in their official capacities as Members of Congress. The District Court granted this motion, but the Court of Appeals did not reach the issue. Accordingly, the issue is not before this Court.

Results of the Committee's reviews were to be transmitted to the President "in time to allow him to give them full consideration before the scheduled events." In ¶ 5 of the affidavit, Mr. Irwin stated that pursuant to "the foregoing directions from the President," the Undersecretaries Committee had prepared and transmitted to the President a report on the proposed underground nuclear test known as "Cannikin," scheduled to take place at Amchitka Island, Alaska. The report was said to have consisted of a covering memorandum from Mr. Irwin, the report of the Undersecretaries Committee, five documents attached to that report and three additional letters separately sent to Mr. Irwin.[3] Of the

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[3] According to the Irwin affidavit, the report contained the following documents:

A. A covering memorandum from Mr. Irwin to the President, dated July 17, 1971. This memorandum is classified Top Secret pursuant to Executive Order 10501.

B. The Report of the Undersecretaries Committee. This report was also classified Top Secret. Attached to the report were additional documents:

1. A letter, classified Secret, from the Chairman of the Atomic Energy Commission (AEC) to Mr. Irwin.

2. A report, classified Top Secret, from the Defense Program Review Committee, of which Dr. Henry Kissinger was the Chairman.

3. The environmental impact statement on the proposed Cannikin test, prepared by the AEC in 1971, pursuant to the National Environmental Policy Act, 42 U. S. C. § 4332 (C). This document had always been "publicly available" and a copy was attached to the Irwin affidavit.

4. A transcript of an oral briefing given by the AEC to the Committee. This document was classified Secret.

5. A memorandum from the Council on Environmental Quality to Mr. Irwin. This memorandum was separately unclassified.

C. In addition to the covering memorandum and the Committee's report (with attached documents), were three letters that had been transmitted to Mr. Irwin:

1. A letter from Mr. William Ruckelshaus, for the Environmental

total of 10 documents, one, an Environmental Impact Statement prepared by AEC, was publicly available and was not in dispute. Each of the other nine was claimed in the Irwin affidavit to have been

> "prepared and used solely for transmittal to the President as advice and recommendations and set forth the views and opinions of individuals and agencies preparing the documents so that the President might be fully apprised of varying viewpoints and have been used for no other purpose."

In addition, at least eight (by now reduced to six) of the nine remaining documents were said to involve highly sensitive matter vital to the national defense and foreign policy and were described as having been classified Top Secret and Secret pursuant to Executive Order 10501.[4]

On the strength of this showing by petitioners, the District Court granted summary judgment in their favor on the grounds that each of the nine documents sought was exempted from compelled disclosure by §§ (b)(1) and (b)(5) of the Act. The Court of Appeals reversed, concluding that subsection (b)(1) of the Act permits the

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Protection Agency. This letter was classified Top Secret, but has now been declassified.

2. A letter from Mr. Russell Train, for the Council on Environmental Quality. Although the Irwin affidavit states that this letter was classified Top Secret, petitioners concede that it was so classified "only because it was to be attached to the Undersecretary's Report." Brief, at 6, n. 5.

3. A letter of Dr. Edward D. David, Jr., for the Office of Science and Technology. This letter is classified Top Secret.

[4] These eight documents were also described as having been classified as "Restricted Data . . . pursuant to the Atomic Energy Act of 1954, as amended. (42 U. S. C. 2014 (Y), 2161 and 2162.)" Petitioners have not asserted that these provisions, standing alone, would justify withholding the documents in this case. But see 5 U. S. C. § 552 (b)(3), relating to matters "specifically exempted from disclosure by statute."

withholding of only the secret portions of those documents bearing a separate classification under Executive Order 10501: "If the nonsecret components [of such documents] are separable from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed." 464 F. 2d 742, 746. The court instructed the District Judge to examine the classified documents "looking toward their possible separation for purposes of disclosure or nondisclosure."

In addition, the Court of Appeals concluded that all nine contested documents fell within subsection (b)(5) of the Act, but construed that exemption as shielding only the "decisional processes" reflected in internal government memoranda, not "factual information" unless that information is "inextricably intertwined with policymaking processes." The court then ordered the District Judge to examine the documents *in camera* (including, presumably, any "nonsecret components" of the six classified documents) to determine if "factual data" could be separated out and disclosed "without impinging on the policymaking decisional processes intended to be protected by this exemption." We granted certiorari, 405 U. S. 974, and now reverse the judgment of the Court of Appeals.

II

The Freedom of Information Act, 5 U. S. C. § 552,[5] is a revision of § 3, the public disclosure section, of the Administrative Procedure Act, 5 U. S. C. § 1002. Section 3 was generally recognized as falling far short of its disclosure goals and came to be looked upon more as a withholding statute than a disclosure statute. See S. Rep. No. 813, 89th Cong., 1st Sess., 5 (1965) (herein-

[5] The Act was passed in 1966, 80 Stat. 250, and codified in its present form in 1967. 81 Stat. 54.

after, S. Rep. No. 813); H. R. Rep. No. 1497, 89th Cong., 2d Sess. 5–6 (1966) (hereinafter, H. Rep. No. 1497). The section was plagued with vague phrases, such as that exempting from disclosure "any function of the United States requiring secrecy in the public interest." Moreover, even "matters of official record" were only to be made available to "persons properly and directly concerned" with the information. And the section provided no remedy for wrongful withholding of information. The provisions of the Freedom of Information Act stand in sharp relief against those of § 3. The Act eliminates the "properly and directly concerned" test of access, stating repeatedly that official information shall be made available "to the public," "for public inspection." Subsection (b) of the Act creates nine exemptions from compelled disclosures. These exemptions are explicitly made exclusive, 5 U. S. C. § 552 (c), and are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed. Aggrieved citizens are given a speedy remedy in district courts, where "the court shall determine the matter *de novo* and the burden is on the agency to sustain its action." 5 U. S. C. § 552 (a)(3). Noncompliance with court orders may be punished by contempt. *Ibid.*

Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands. Subsection (b) is part of this scheme and represents the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses. As the Senate Committee explained, it was not "an easy task to balance the oppos-

ing interests, but it is not an impossible one either . . . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." S. Rep. No. 813, at 3.[6]

It is in the context of the Act's attempt to provide a "workable formula" that "balances, and protects all interests," that the conflicting claims over the documents in this case must be considered.

A

Subsection (b)(1) of the Act exempts from forced disclosure "matters . . . specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." According to the Irwin affidavit, the six documents for which Exemption 1 is now claimed were all duly classified Top Secret or Secret, pursuant to Executive Order 10501, 3 CFR 280 (Jan. 1, 1970). That order was promulgated under the

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[6] The Report states (*ibid.*):

"It is the purpose of the present bill . . . to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language . . . .

"At the same time that a broad philosophy of "freedom of information" is enacted into law, it is necessary to protect certain equally important rights of privacy with respect to certain information in Government files, such as medical and personnel records. It is also necessary for the very operation of our Government to allow it to keep confidential certain material, such as the investigatory files of the Federal Bureau of Investigation.

"It is not an easy task to balance the opposing interests, but it is not an impossible one either. It is not necessary to conclude that to protect one of the interests, the other must, of necessity, either be abrogated or substantially subordinated. Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure."

See also H. Rep. No. 1497, at 6.

authority of the President in 1953, 18 Fed. Reg. 7049, and, since that time, has served as the basis for the classification by the Executive Branch of information "which requires protection in the interests of national defense."[7] We do not believe that Exemption 1 permits compelled disclosure of documents, such as the six here, that were classified pursuant to this Executive Order. Nor does the Exemption permit *in camera* inspection of such documents to sift out so-called "non-secret components." Obviously, this test was not the only alternative available. But Congress chose to follow the Executive's determination in these matters and that choice must be honored.

The language of Exemption 1 was chosen with care. According to the Senate Committee, "[t]he change of standard from 'in the public interest' is made both to delimit more narrowly the exception and to give it a more precise definition. The phrase 'public interest' in Section 3 (a) of the Administrative Procedure Act has been subject to conflicting interpretations, often colored by personal prejudices and predilections. It admits of no clear delineations." S. Rep. No. 812, at 8. The House Committee similarly pointed out that Exemption 1 "both limits the present vague phrase, 'in the public interest,' and gives the area of necessary secrecy a more precise definition." H. Rep. No. 1497, at 9. Manifestly, Exemption 1 was intended to dispell uncertainty with respect to public access to material affecting "national defense or foreign

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[7] Executive Order 10051 has been superseded, as of June 1, 1972, by Executive Order 11652, 37 Fed. Reg. 5209, which similarly provides for the classification of material "in the interest of national defense or foreign relations."

Portions of two documents for which Exemption 1 is claimed were ordered disclosed in connection with the action brought to enjoin the test (see n. 1, *supra*). Petitioners seek no relief with respect to any matters already disclosed.

policy." Rather than some vague standard, the test was to be simply whether the President has determined by Executive Order that particular documents are to be kept secret. The language of the Act itself is sufficently clear in this respect, but the legislative history disposes of any possible argument that Congress intended the Freedom of Information Act to subject executive security classifications to judicial review at the insistence of anyone who might seek to question them. Thus the House Report stated with respect to subsection (b)(1) that "citizens both in and out of Government can agree to restrictions on categories of information which the President has determined must be kept secret to protect the national defense or to advance foreign policy, such as matters classified pursuant to Executive Order 10501." H. Rep. No. 1497, pp. 9–10.[8] Similarly, Representative Moss, Chairman of the House Subcommittee that considered the bill, stated that the exemption "was intended to specifically recognize that Executive order [No. 10501]" and was drafted "in conformity with that Executive order." Hearings before a Subcommittee of the House Committee on Government Operations, "Federal Public Records Law," 89th Cong., 1st Sess. (March and April 1965), pp. 52, 105 (hereinafter, 1965 House Hearings). And a member of the committee, Representative Gallagher, stated that the legislation and the Committee

[8] It is true, the House Report indicates that *the President* must determine that the exempted matter be kept secret. Clearly, however, Executive Order 10501 is based on presidential authority and specifically delegates that authority to "the departments, agencies, and other units of the executive branch *as hereinafter specified.*" 3 CFR, at 281 (1970). One may disagree with the scope of the delegation or with how the delegated authority is exercised in particular cases, but the authority itself nevertheless remains the President's and it is his judgment that the first exemption was designed to respect.

Report make it "crystal clear that the bill in no way affects categories of information which the President ... has determined must be classified to protect the national defense or to advance foreign policy. These areas of information most generally are classified under Executive Order No. 10501." 112 Cong. Rec. 13659.

These same sources make untenable the argument that classification of material under Executive Order 10501 is somehow insufficient for Exemption 1 purposes, or that the exemption contemplates the issuance of orders under some other authority, for each document the Executive may want protected from disclosure under the Act. Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering. Cf. *United States* v. *Reynolds*, 345 U. S. 1 (1953). But Exemption 1 does neither. It states with the utmost directness that the Act exempts matters "specifically required by Executive order to be kept secret." Congress was well aware of the Order and obviously accepted determinations pursuant to that Order as qualifying for exempt status under § (b)(1). In this context it is patently unrealistic to argue that the "Order has nothing to do with the first exemption." [9]

[9] Respondents' Brief, at 18. Respondents note that the preamble of the new Executive Order 11652 (see n. 7, *supra*), specifies that material classified pursuant to its provisions "is expressly exempted from disclosure by Section 552 (b)(1) of Title 5, United States Code." Executive Order 10501 has no comparable recital, but only the sheerest ritualism would distinguish the effects of the two orders on any such basis. Indeed, respondents' apparent acceptance of the new order as a justifiable ground for resisting disclosure under Exemption 1 points to the absurdity of maintaining that Executive Order 10501 is irrelevant to the Act.

What has been said thus far makes wholly untenable any claim that the Act intended to subject the soundness of executive security classifications to judicial review at the insistence of any objecting citizen. It also negates the proposition that Exemption 1 authorizes or permits *in camera* inspection of a contested document bearing a single classification so that the court may separate the secret from the supposedly nonsecret and order disclosure of the latter. The Court of Appeals was thus in error. The Irwin affidavit stated that each of the six documents for which Exemption 1 is now claimed "are and have been classified" Top Secret and Secret "pursuant to Executive Order No. 10501" and as involving "highly sensitive matter that is vital to our national defense and foreign policy." The fact of those classifications and the documents' characterizations have never been disputed by respondents. Accordingly, upon such a showing and in such circumstances, petitioners had met their burden of demonstrating that the documents were entitled to protection under Exemption 1 and the duty of the District Court under § 552 (a)(3) was therefore at an end.[10]

B

Disclosure of the three documents conceded to be "unclassified" is resisted solely on the basis of Exemp-

[10] This conclusion is not undermined by the new Executive Order 11652, which calls for the separation of documents into classified and unclassified portions, where practicable. 37 Fed. Reg., at 5212. On the contrary, that new order provides that the separating be done by the Executive, not the Judiciary, and, like its predecessor, permits declassification of material only in accordance with its procedures. More importantly, the very existence of the new order demonstrates that the Executive exercises a continuing responsibility for determining the need for secrecy in matters that affect national defense. Exemption 1 recognizes that responsibility by leaving to the Executive, under such orders as shall be developed, the decision of what may be disclosed and what must be kept secret.

tion 5 of the Act.[11] That Exemption was also invoked, alternatively, to support withholding the six documents for which Exemption 1 was claimed. It is beyond question that the Irwin affidavit, standing alone, is sufficient to establish that all of the documents involved in this litigation are "inter-agency or intra-agency" memoranda or "letters" that were used in the decisionmaking processes of the Executive Branch. By its terms, however, Exemption 5 creates an exemption for such documents only insofar as they "would not be available by law to a party . . . in litigation with the agency." This language clearly contemplates that the public is entitled to all such memoranda or letters that a private party could discover in litigation with the agency. Drawing such a line between what may be withheld and what must be disclosed is not without difficulties. In many important respects, the rules governing discovery in such litigation have remained uncertain from the very beginnings of the Republic.[12] Moreover, at best the discovery rules

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[11] 5 U. S. C. § 552:

"(a) Each agency shall make available to the public information as follows:"

. . . . . .

"(b) This section does not apply to matters that are—

. . . . . .

"(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

The three documents are: the CEQ memorandum to Mr. Irwin, the Train letter, and the Ruckelshaus letter, which has now been declassified.

[12] See generally, 4 Moore, Federal Practice ¶ 26.61 (1972) and authorities collected (*id.*, at ¶ 26.61 [1] n. 2); 8 Wigmore, Evidence §§ 2378, 2379 (McNaughton rev. 1961) (hereinafter Wigmore).

There were early disputes over the issue of Executive privilege. See Chief Justice Marshall's decisions in the trial of *United States* v. *Burr* (No. 14,692), 25 Fed. Cas. 30 and 187, 191–192 (CCD Va.

can only be applied under Exemption 5 by way of rough analogies. For example, we do not know whether the Government is to be treated as though it were a prosecutor, a civil plaintiff, or a defendant.[13] Nor does the Act, by its terms, permit inquiry into particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant. Still, the legislative history of Exemption 5 demonstrates that Congress intended to incorporate generally the recognized rule that "confidential intra-agency advisory opinions . . . are privileged from inspection." *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 946 (Ct. of Cl. 1958) (Mr. Justice Reed). As Mr. Justice Reed there stated:

> "There is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action."

The importance of this underlying policy was echoed again and again during legislative analysis and discussions of Exemption 5:

> "It was pointed out in the comments of many of the agencies that it would be impossible to have any frank discussion of legal or policy matters in writing if all such writings were to be subjected to public

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1807), discussed in 8 Wigmore, § 2371, at 739–741 (3d ed. 1940) and 4 Moore ¶ 26.61 [6.–4]. See also Wigmore § 2378, at 805 and n. 21.

[13] Different rules have been held to apply in each situation. See, *e. g.*, *United States*, v. *Andolschek*, 142 F. 2d 503, 506 (CA2 1944) (L. Hand, J.) (United States as prosecutor); *Bank Line, Ltd.* v. *United States*, 76 F. Supp. 801 (SDNY 1948) (United States as defendant). Moreover, in actions under the Freedom of Information Act, courts are not given the option to impose alternative sanctions—short of compelled disclosure—such as striking a particular defense or dismissing the Government's action.

> scrutiny. It was argued, and with merit, that efficiency of Government would be greatly hampered if, with respect to legal and policy matters, all Government agencies were prematurely forced to "operate in a fishbowl." The committee is convinced of the merits of this general proposition, but it has attempted to delimit the exception as narrowly as consistent with efficient Government operation." S. Rep. No. 813, at 9.

See also H. Rep. No. 1497, at 10. But the privilege that has been held to attach to intragovernment memoranda clearly has finite limits, even in civil litigation. In each case, the question was whether production of the contested document would be "injurious to the consultative functions of government that the privilege of nondisclosure protects." *Kaiser* v. *Aluminum & Chemical Corp., supra.*, at 946. Thus, in the absence of a claim that disclosure would jeopardize state secrets, see *United States* v. *Reynolds*, 345 U. S. 1 (1953), memoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government.[14] Morevover, in applying the priv-

[14] See, *e. g.*, *Machin* v. *Zuckert*, 114 U. S. App. D. C. 335, 316 F. 2d 336, cert. denied, 375 U. S. 896 (1963) (Air Force Aircraft Accident Investigation Report); *Boeing Airplane Co.* v. *Coggeshall*, 108 U. S. App. D. C. 106, 280 F. 2d 654, 660–661 (1960) (Renegotiation Board documents); *Olson Rug Co.* v. *NLRB*, 291 F. 2d 655, 662 (CA7 1961) (no claim that NLRB documents are "exclusively policy recommendations"); *Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena*, 40 F. R. D. 318, 327 (DDC 1966), aff'd, 384 F. 2d 979 (CADC), cert. denied, 389 U. S. 952 (1967) (discovery denied because documents "wholly of opinions, recommendations and deliberations"); *McFadden* v. *Avco Corp.*, 278 F. Supp. 57, 59–60 (MD Ala. 1967), and cases cited therein.

In *United States* v. *Cotton Valley Operators Comm.*, 9 F. R. D.

ilege, courts often were required to examine the disputed documents *in camera*, in order to determine which should be turned over or withheld.[15] We must assume, therefore, that Congress legislated against the backdrop of this case law, particularly since it expressly intended "to delimit the exception [5] as narrowly as consistent with efficient Government operation." S. Rep. No. 813, at 9. See H. Rep. No. 1497, at 10. Virtually all of the courts that have thus far applied Exemption 5 have recognized that it requires different treatment for materials reflecting deliberative or policy-making processes on the one hand, and purely factual, investigative matters on the other.[16]

719, 720 (WD La. 1949), aff'd by equally divided court, 339 U. S. 940 (1950), the United States offered to file "an abstract of factual information" contained in the contested documents (FBI reports).

[15] See, *e. g.*, *Machin* v. *Zuckert*, 114 U. S. App. D. C. 335, 316 F. 2d 336, 341, cert. denied, 375 U. S. 896 (1963) (private tort action; discovery of Air Force Aircraft Accident Investigation Report); *Boeing Airplane Co.* v. *Coggeshall*, 108 U. S. App. D. C. 106, 280 F. 2d 654, 662 (1960) (excess profits tax redetermination); *Olson Rug Co.* v. *NLRB*, 291 F. 2d 655, 660, 662 (CA7 1961) (discovery for use in defense to contempt proceedings); *O'Keefe* v. *Boeing Co.*, 38 F. R. D. 329, 336 (SDNY 1965) (private tort action; Air Force Investigation Reports); *Rosee* v. *Board of Trade*, 36 F. R. D. 684, 687–688 (ND Ill. 1965); *United States* v. *Cotton Valley Operators Comm.*, 9 F. R. D. 719 (WD La. 1949), aff'd by equally divided court, 339 U. S. 940 (1950) (civil antitrust suit). Cf. *United States* v. *Procter & Gamble Co.*, 25 F. R. D. 485, 492 (NJ 1960) (criminal antitrust prosecution). See Wigmore § 2379, at 812.

In *Kaiser Aluminum & Chemical Corp.*, *supra*, where *in camera* inspection of the documents was refused because of plaintiff's failure to make a definite showing of necessity, 157 F. Supp., at 947, the "objective facts" contained in the disputed document were "otherwise available." *Id.*, at 946.

[16] See, *e. g.*, *Soucie* v. *David*, 145 U. S. App. D. C. 144, 448 F. 2d 1067 (1971); *Grumman Aircraft Eng. Corp.* v. *Renegotiation Bd.*, 138 U. S. App. D. C. 147, 425 F. 2d 578, 582 (1970); *Bristol-Myers*

Nothing in the legislative history of Exemption 5 is contrary to such a construction. When the bill that ultimately became the Freedom of Information Act, S. 1160, was introduced in the 89th Congress, it contained an exemption that excluded:

> "intra-agency or inter-agency memorandums or letters dealing solely with matters of law or policy."[17]

Co. v. *FTC*, 138 U. S. App. D. C. 22, 424 F. 2d 935 (1970); *International Paper Co.* v. *FPC*, 438 F. 2d 1349, 1358–1359 (CA2), cert. denied, 404 U. S. 827 (1971); *General Services Admin.* v. *Benson*, 415 F. 2d 878 (CA9 1969) aff'g, 289 F. Supp. 590 (WD Wash. 1969); *Long Island R. Co.* v. *United States*, 318 F. Supp. 490, 499 n. 9 (EDNY 1970); *Consumers Union* v. *Veterans Admin.*, 301 F. Supp. 796 (SDNY 1969), appeal dismissed as moot, 436 F. 2d 1363 (CA2 1971); *Olson* v. *Camp.*, 328 F. Supp. 728, 731 (ED Mich. 1970); *Reliable Transfer Co.* v. *United States*, 53 F. R. D. 24 (EDNY 1971).

The proposed Federal Rules of Evidence appear to recognize this construction of Exemption 5. Proposed Rule 509 (a)(2)(A) defines "official information" to include "intragovernmental opinions or recommendations submitted for consideration in the performance of decisional or policymaking functions." Rule 509 (c) further provides that "[i]n the case of privilege claimed for official information the court may require examination *in camera* of the information itself."

[17] Hearings before the Subcommittee of Administrative Practice and Procedure of the Senate Committee on the Judiciary, on S. 1160, S. 1376, S.1758, and S. 1879, 89th Cong., 1st Sess., at 7 (May 1965) (hereinafter 1965 Senate Hearings). This exemption had itself been broadened during its course through the Senate in the 88th Congress. The exemption originally applied only to internal memoranda "relating to the consideration and disposition of adjudicating and rulemaking matters." Section 3 (c) of S. 1666, 88th Cong., 2d Sess. (1964), introduced in 110 Cong. Rec. 17086. That early formulation came under attack for not sufficiently protecting material dealing with general policy matters, not directly related to adjudication or rulemaking. See Hearings before the Subcommittee on Administrative Practice and Procedure of the Senate Judiciary Committee, on S. 1666 and S. 1663, 88th Cong., 1st Sess., at 202–203, 247 (Oct. 1963).

This formulation was designed to permit "[a]ll *factual* material in Government records . . . to be made available to the public." S. Rep. No. 1219, 88th Cong., 2d Sess. 7 (1964). (Emphasis in original.) The formulation was severely criticized, however, on the ground that it would permit compelled disclosure of an otherwise private document simply because the document did not deal "solely" with legal or policy matters. Documents dealing with mixed questions of fact, law and policy would inevitably, under the proposed exemption, become available to the public.[18] As a result of this criticism, Exemption 5 was changed to substantially its present form. But plainly, the change cannot be read as suggesting that *all* factual material was to be rendered exempt from compelled disclosure. Congress sensibly discarded a wooden exemption that could have meant disclosure of manifestly private and confidential policy recommendations simply because the document containing them also happened to contain factual data. That decision should not be taken, however, to embrace an equally wooden exemption permitting the withholding of factual material otherwise available on discovery merely because it was placed in a memorandum with matters of

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[18] See 1965 Senate Hearings, at 36, 94–95, 112–113, 205, 236–237, 244, 366–367, 382–383, 402–403, 406–407, 417, 437, 445–446, 450, 490. See 1965 House Hearings, at 27–28, 49, 208, 220, 223–224, 229–230, 245–246, 255–257. Examples of these many statements are:

Federal Aviation Administration (1965 Senate Hearings, at 446):

"Few records would be entirely devoid of factual date, thus leaving papers on law and policy relatively unprotected. Staff working papers and reports prepared for use within the agency of the executive branch would not be protected by the proposed exemptions."

Department of Commerce (1965 Senate Hearings, at 406):

"Under this provision, internal memorandums dealing with *mixed questions of fact, law and policy* could well become public information." (Emphasis in original.)

law, policy or opinion. It appears to us that Exemption 5 contemplates that the public's access to internal memoranda will be governed by the same flexible, common sense approach that has long governed private parties' discovery of such documents involved in litigation with government agencies. And, as noted, that approach extended and continues to extend to the discovery of purely factual material appearing in those documents in a form that is severable without compromising the private remainder of the documents.

Petitioners further argue that although *in camera* inspection and disclosure of "low-level, routine, factual reports" [19] may be contemplated by Exemption 5, that type of document is not involved in this case. Rather, it is argued, the documents here were submitted directly to the President by top-level government officials, involve matters of major significance, and contain, by their very nature, a blending of factual presentations and policy recommendations that are necessarily "inextricably intertwined with policymaking processes." 464 F. 2d, at 746. For these reasons, the petitioners object both to disclosure of any portions of the documents and to *in camera* inspection by the District Court.

To some extent this argument was answered by the Court of Appeals, for its remand expressly directed the District Judge to disclose only such factual material that is not "intertwined with policymaking processes" and that may safely be disclosed "without impinging on the policymaking decisional processes intended to be protected by this exemption." We have no reason to believe that, if petitioners' characterization of the documents is accurate, the District Judge would go beyond the limits of the remand and in any way compromise the confidentiality of deliberative information that is entitled to protection under Exemption 5.

[19] Tr. of Oral Arg., at 23.

We believe, however, that the remand now ordered by the Court of Appeals is unnecessarily rigid. The Freedom of Information Act may be invoked by any member of "the public"—without a showing of need—to compel disclosure of confidential government documents. The unmistakable implication of the decision below is that any member of the public invoking the Act may require that otherwise confidential documents be brought forward and placed before the District Court for *in camera* inspection—no matter how little, if any, purely factual material may actually be contained therein. Exemption 5 mandates no such result. As was said in *Kaiser Aluminum & Chemical Corp., supra,* at 947: "It seems . . . obvious that the very purpose of the privilege, the encouragement of open expression of opinion as to governmental policy, is somewhat impaired by a requirement to submit the evidence even [*in camera*]." Plainly, in some situations, *in camera* inspection will be necessary and appropriate. But it need not be automatic. An agency should be given the opportunity, by means of detailed affidavits or oral testimony, to establish to the satisfaction of the District Court that the documents sought fall clearly beyond the range of material that would be available to a private party in litigation with the agency. The burden is, of course, on the agency resisting disclosure, 5 U. S. C. § 552 (a)(3), and if it fails to meet its burden without *in camera* inspection, the District Court may order such inspection. But the agency may demonstrate, by surrounding circumstances, that particular documents are purely advisory and contain no separable, factual information. A representative document of those sought may be selected for *in camera* inspection. And, of course, the agency may itself disclose the factual portions of the contested documents and attempt to show, again by circumstances, that the excised portions constitute the bare bones of protected matter. In short,

in camera inspection of all documents is not a necessary or inevitable tool in every case. Others are available. Cf. *United States* v. *Reynolds, supra.* In the present case, the petitioners proceeded on the theory that all of the nine documents were exempt from disclosure in their entirety under Exemption 5 by virtue of their use in the decisionmaking process. On remand, petitioners are entitled to attempt to demonstrate the propriety of withholding any documents, or portions thereof, by means short of submitting them for *in camera* inspection.

The judgment is reversed and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

SUPREME COURT OF THE UNITED STATES

No. 71-909

Environmental Protection Agency et al., Petitioners, *v.* Patsy T. Mink et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January 22, 1973]

MR. JUSTICE STEWART, concurring.

This case presents no constitutional claims, and no issues regarding the nature or scope of "executive privilege." It involves no effort to invoke judicial power to require any documents to be reclassified under the mandate of the new Executive Order 11652. The case before us involves only the meaning of two exemptive provisions of the so-called Freedom of Information Act, 5 U. S. C. § 552.

My Brother DOUGLAS says that the Court makes a "shambles" of the announced purpose of that Act. But it is Congress, not the Court, that in § 552 (b)(1) has ordained unquestioning deference to the Executive's use of the "secret" stamp. As the opinion of the Court demonstrates, the language of the exemption, confirmed by its legislative history, plainly withholds from disclosure "matters . . . specifically required by Executive Order to be kept secret in the interest of national defense or foreign policy." In short, once a federal court has determined that the Executive has imposed that requirement, it may go no further under the Act.

One would suppose that a nuclear test that engendered fierce controversy within the Executive Branch of our Government would be precisely the kind of event that should be opened to the fullest possible disclosure consistent with legitimate interests of national defense.

Without such disclosure, factual information available to the concerned Executive agencies cannot be considered by the people or evaluated by the Congress. And with the people and their representatives reduced to a state of ignorance, the democratic process is paralyzed.

But the Court's opinion demonstrates that Congress has conspicuously failed to attack the problem that my Brother DOUGLAS discusses. Instead, it has built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document "secret," however cynical, myopic, or even corrupt that decision might have been.

The dissenting opinion of my Brother BRENNAN makes an admirably valiant effort to deflect the impact of this rigid exemption. His dissent focuses on the statutory requirement that "the Court shall determine the matter *de novo* . . . ." But the only "matter" to be determined *de novo* under § 552 (b)(1) is whether in fact the President has required by Executive Order that the documents in question are to be kept secret. Under the Act as written, that is the end of a court's inquiry*

As the Court points out, "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations the Executive privilege may be held to impose upon such congressional ordering." But in enacting § 552 (b)(1) Congress chose, instead, to decree blind acceptance of Executive fiat.

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*Similarly rigid is § 552 (b)(3), which forbids disclosure of materials that are "specifically exempted from disclosure by statute." Here, too, the only "matter" to be determined in a district court's *de novo* inquiry is the factual existence of such a statute, regardless of how unwise, self-protective or inadvertent the enactment might be.

SUPREME COURT OF THE UNITED STATES

No. 71-909

Environmental Protection Agency et al., Petitioners, *v.* Patsy T. Mink et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January 22, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in part and dissenting in part.

The Court holds today that the Freedom of Information Act, 5 U. S. C. § 552 (1970), authorizes the District Court to make an *in camera* inspection of documents claimed to be exempt from public disclosure under Exemption 5 of the Act. In addition, the Court concludes that, as an exception to this rule, the Government may, in at least some instances, attempt to avoid *in camera* inspection through use of detailed affidavits or oral testimony. I concur in those aspects of the Court's opinion. In my view, however, those procedures should also govern matters for which Exemption 1 is claimed, and I therefore dissent from the Court's holding to the contrary. I find nothing whatever on the face of the statute or in its legislative history which distinguishes the two Exemptions in this respect, and the Court suggests none. Rather, I agree with my Brother DOUGLAS that the mandate of § 552 (a)(3)—"the court shall determine the matter *de novo* and the burden is on the agency to sustain its action"—is the procedure that Congress prescribed for both Exemptions.

The Court holds that Exemption 1 immunizes from judicial scrutiny any document classified pursuant to

Executive Order 10501, 3 CFR § 292 (Jan. 1, 1971).[1] In reaching this result, however, the Court adopts a construction of Exemption 1 which is flatly inconsistent with the legislative history and, indeed, the unambiguous language of the Act itself.[2] In plain words, Exemption 1 exempts from disclosure only material *"specifically required* by Executive order to be kept secret *in the interest of the national defense or foreign policy."* (Emphasis added.) Executive Order 10501, however, which was promulgated 13 years before the passage of the Act, does not require that any *specific* documents be classified. Rather, the Executive Order simply delegates the right to classify to agency heads, who are empowered to classify information as Confidential, Secret, or Top Secret. Thus, the classification decision is left to the sole discretion of these agency heads. Moreover, in exercising this discretion, agency heads are not required to examine each document separately to determine the need for secrecy but, instead, may adopt *blanket* classifications, without regard to the content of any particular document. Thus, as §§ 3 (b) and 3 (c) of the Order make clear, matters for which there is no need for secrecy "in the interest of the national defense or foreign policy" may be indiscriminately classified in conjunction with those matters for which there is a genuine need for secrecy:

> "3 (b) *Physically Connected Documents.* The classification of a file or group of physically connected documents shall be at least as high as that

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[1] Executive Order 10501 was revoked on March 8, 1972, and replaced with Executive Order 11652, 37 Fed. Reg. 5209, which became effective June 1, 1972. See pp. 7–9, *infra*.

[2] "The policy of the Act requires that the . . . exemptions [be construed narrowly]." *Soucie* v. *David*, — U. S. App. D. C. —, —, 448 F. 2d 1067, 1080 (1971). "A broad construction of the exemptions would be contrary to the express language of the Act." *Wellford* v. *Hardin*, 444 F. 2d 21, 25 (CA4 1971).

of the most highly classified document therein. Documents separated from the file or group shall be handled in accordance with their individual defense classification.

"3 (c) *Multiple Classification.* A document, product, or substance shall bear a classification at least as high as that of its highest classified component. The document, product, or substance shall bear only one over-all classification, notwithstanding that pages, paragraphs, sections, or components thereof bear different classifications."

Even the petitioners concede,[3] no doubt in response to the "specifically required" standard of § 552 (b)(1) and the "specifically stated" requirement of § 552 (c),[4] that documents classified pursuant to § 3 (b) of Executive

[3] Petitioners' Brief for Certiorari, at 9, n. 4.

[4] Section 552 (c) provides:

"This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress."

The accompanying Senate Report emphasizes that § 552 (c) places a heavy burden on the Government to justify nondisclosure:

"The purpose of [§ 552 (c)] is to make it clear beyond a doubt that all materials of the Government are to be made available to the public by publication or otherwise unless *explicitly* allowed to be kept secret by one of the exemptions in [§ 552 (b)]." S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965) (emphasis added).

A commenator cogently argues that the "pull of the word 'specifically' [in § 552 (c)] is toward emphasis on [the] statutory language" of the nine stated exemptions. The "specifically stated" clause in § 552 (c), he notes, "is often relevant in determining the proper interpretation of particular exemptions." K. C. Davis, Administrative Law § 3A.15, at 142 (1970 Supp.). See also Davis, The Information Act: A Preliminary Analysis, 34 U. Chi. L. Rev. 761 (1967).

For a detailed study of the Freedom of Information Act and its background, see Note, Comments on Proposed Amendments to § 3 of the Administrative Procedure Act: The Freedom of Information Bill, 40 Notre Dame Law. 417 (1965).

Order 10501 cannot qualify under Exemption 1. Indeed, petitioners apparently accept the conclusion of the Court of Appeals that as to § 3 (b):

> "This court sees no basis for withholding on security grounds a document that, although separately unclassified, is regarded secret merely because it has been incorporated into a secret file. To the extent that our position in this respect is inconsistent with the above-quoted paragraph of Section 3 of Executive Order 10501, we deem it required by the terms and purpose of the [Freedom of Information Act], enacted subsequently to the Executive Order." 464 F. 2d., at 745.

Nevertheless, petitioners maintain that information classified pursuant to § 3 (c) of the Order is exempt from disclosure under Exemption 1. The Court of Appeals rejected that contention, and in my view, correctly. The Court of Appeals stated:

> "The same reasoning applies to this provision as the one dealing with physically-connected documents. Secrecy by association is not favored. If the non-secret components are separable from the secret remainder and may be read separately without distortion of meaning, they too should be disclosed." 464 F. 2d., at 746.

Petitioners' argument, adopted by the Court, is that this construction of the Act imputes to Congress an intent to authorize judges independently to review the Executive's decision to classify documents in the interest of the national defense or foreign policy. That argument simply misconceives the holding of the Court of Appeals. Information classified pursuant to § 3 (c), it must be emphasized, may receive the stamp of secrecy not because such secrecy is necessary to promote "the national defense or foreign policy," but simply because it consti-

tutes a part of such other information which genuinely merits secrecy. Thus, to rectify this situation, the Court of Appeals ordered only that the District Court *in camera* determine "[i]f the non-secret components are separable from the secret remainder and may be read separately without distortion of meaning . . . ." The determination whether any components are in fact "non-secret" is left exclusively to the agency head representing the Executive Branch. The District Court is not authorized to declassify or to release information which the Executive, in its sound discretion, determines must be classified to "be kept secret in the interest of the national defense or foreign policy."[5] The District Court's authority stops with the inquiry whether there are components of the documents which would not have been independently classified as secret. If the District Court finds, on *in camera* inspection, that there are such components, and that they can be read separately without distortion of meaning, the District Court may order their release. The District Court's authority to make that determination is unambiguously stated in § 552 (a)(3): "the [district] court shall determine the matter *de novo* and the burden is on the agency to sustain its action." The Court's contrary holding is in flat defiance of that congressional mandate.[6]

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[5] See Developments in the Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1224–1225 (1972).

[6] "[G]iven the requirement that a file or document is generally classified at the highest level of classification of any information enclosed, it will often be the case that a classified file will contain information that could be released separately. Because it is not 'specifically required by Executive order to be kept secret,' such information is not privileged under the Information Act. To insure that an overall classification is not being used to protect unprivileged papers, a reviewing court should inspect the documents sought by a litigant." Developments in the Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130, 1223 (1972).

Indeed, only the Court of Appeals' construction is consistent with the congressional plan in enacting the Freedom of Information Act. We have the word of both Houses of Congress that the *de novo* proceeding requirement was enacted expressly "in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion." S. Rep. No. 813, 89th Cong., 1st Sess. 8 (1965) (hereinafter cited as S. Rep. No. 813); H. R. Rep. No. 1497, 89th Cong., 2d Sess. 9 (1966) (hereinafter cited as H. Rep. No. 1497). What was granted, and purposely so, was a broad grant to the District Court of "authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld." H. Rep. No. 1497, at 9. And to underscore its meaning Congress rejected the traditional rule of deference to administrative determinations by "[p]lacing the burden of proof upon the agency" to justify the withholding. S. Rep. No. 813, at 8; H. Rep. No. 1497, at 9. The Court's rejection of the Court of Appeals' construction is inexplicable in the face of this overwhelming evidence of the congressional design.

The Court's reliance on isolated references to Executive Order 10501 in the congressional proceedings is erroneous and misleading. The Court points to a single passing reference to the Order in the House Report, which even a superficial reading reveals to be merely suggestive of the kinds of information that the Executive Branch might classify. Nothing whatever in the Report even remotely implies that the Order was to be recognized as immunizing from public disclosure the entire file of documents merely because one or even a single paragraph of one has been stamped secret. The Court also calls to its support some comments out of context of Congress-

men Moss and Gallagher on the House floor. But on their face, these comments do no more than confirm that Exemption 1 was written with awareness of the existence of Executive Order 10501. Certainly, whatever the significance that may be attached to debating points in construing a statute,[7] these comments hardly support the Court's conclusion that a classification pursuant to Executive Order 10501, without more, immunizes an entire document from disclosure under Exemption 1.

Executive Order 10501 was promulgated more than a decade before the Freedom of Information Act was debated in Congress. Yet no reference to the Order can be found in either the language of the Act or the Senate Report. Under these circumstances, it would seem odd, to say the least, to attribute to Congress an intent to incorporate "without reference" Executive Order 10501 into Exemption 1. Indeed, petitioners' concession that "physically connected documents," classified under § 3 (b) of the Order, are not immune from judicial inspection serves only to reinforce the conclusion that the mere fact of classification under § 3 (c) cannot immunize the identical documents from judicial scrutiny.

The Court's rejection of the Court of Appeals' construction of Exemption 1 is particularly insupportable in light of the cogent confirmation of its soundness supplied by the Executive itself. In direct response to the Act, Order 10501 has been revoked and replaced by Order 11652 which expressly requires classification of documents in the manner the Court of Appeals required the District Court to attempt *in camera*. The Order, which was issued on March 8, 1972, and became effective on June 1, 1972, 37 Fed. Reg. 5209 (Mar. 10, 1972), explicitly attributes its form to the Executive's desire to accom-

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[7] See *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951) (Jackson, J., concurring) (Frankfurter, J., dissenting).

modate its procedures to the objectives of the Freedom of Information Act:

> "The interests of the United States and its citizens are best served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current information policies of the executive branch."

Moreover, in his statement accompanying the promulgation of the new Order, the President stated: "The Executive order I have signed today is based upon . . . a reexamination of the rationale underlying the Freedom of Information Act." 8 Presidential Documents 542 (Mar. 13, 1972).

The new Order recites that "*some* official information and material . . . bears directly on the effectiveness of our national defense and the conduct of our foreign relations" and that "[*t*]*his* official information or material, referred to as classified information or material, is expressly exempted from public disclosure by Section 552 (b)(1) of [the Freedom of Information Act]." (Emphasis added.) Thus, the Executive clearly recognized that Exemption 1 applies only to matter *specifically* classified "in the interest of the national defense or foreign policy." And in an effort to comply with the Act's mandate that genuinely secret matters be carefully separated from the nonsecret components, § 4 (a) of the new Order provides:

> "*Documents in General* . . . . Each classified document shall . . . to the extent practicable, be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use."

The President emphasized this requirement in his statement:

> "A major course of unnecessary classification under the old Executive order was the practical impossibility of discerning which *portions* of a classified document actually required classification. Incorporation of any material from a classified paper into another document usually resulted in the classification of the new document, and *innocuous portions of neither paper could be released.*" 8 Presidential Documents 544 (Mar. 13, 1972) (emphasis added).

It is of course true, as the Court observes, that the Order "provides that the separating be done by the Executive, not the Judiciary . . . ." *Ante*, p. 11, n. 10. But that fact lends no support to a construction of Exemption 1 precluding judicial inspection to enforce the congressional purpose to effect release of nonsecret components separable from the secret remainder. Rather, the requirement of judicial inspection made explicit in § 552 (a)(3) is the keystone of the congressional plan, expressly deemed "essential in order that the ultimate decision as to the propriety of the agency's action is made by the court and prevent it from becoming meaningless judicial sanctioning of agency discretion." S. Rep. No. 813, at 8; H. Rep. No. 1497, at 9. It could not be more clear, therefore, that Congress sought to make certain that the ordinary principle of judicial deference to agency discretion was discarded under this Act. The Executive was not to be allowed "to file an affidavit stating [the] conclusion [that documents are exempt] and by so doing foreclose any other determination of the fact." *Cowles Communications, Inc.* v. *Department of Justice*, 325 F. Supp. 726, 727 (ND Cal. 1971). Accord, *Frankel* v. *SEC*, 336 F. Supp. 675, 677, n. 4 (SDNY 1971), rev'd on other grounds, 460 F. 2d 813 (CA2 1972); *Philadelphia News-*

papers, Inc. v. *HUD*, 343 F. Supp. 1176, 1180 (ED Pa. 1972).[8]

The Court's interpretation of Exemption 1 as a complete bar to judicial inspection of matters claimed by the Executive to fall within it wholly frustrates the objective of the Freedom of Information Act. That interpretation makes a nullity of the Act's requirement of *de novo* judicial review. The judicial role becomes "meaningless judicial sanctioning of agency discretion," S. Rep. No. 813, at 8; H. Rep. No. 1497, at 9, the very result Congress sought to prevent by incorporating the *de novo* requirement.

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[8] In support of their claim that Executive Order 10501 automatically and without judicial review activates the exemption of § 552 (b)(1), petitioners rely upon *Epstein* v. *Resor*, 421 F. 2d 930 (1970). Rather, *Epstein* confirms the Court of Appeals' interpretation of the Act. The *Epstein* court refused a request to review *in camera* documents classified pursuant to Executive Order 10501, but only because the Government, at the plaintiff's request, had begun a current review of the documents on "a paper-by-paper basis." Moreover, in response to the argument that petitioners advance here—namely, that the mere classification of a document precludes judicial review—*Epstein* states:

"[I]n view of the legislative purpose to make it easier for private citizens to secure Government information, it seems most unlikely that [the Act] was intended to foreclose an (a)(3) judicial review of the circumstances of the exemption. Rather it would seem that [subsection] (b) was intended to specify the basis for withholding under (a)(3) and that judicial review *de novo* with the burden of proof on the agency should be had as to whether the conditions of the exemption in truth exist." 421 F. 2d, at 932–933.

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No. 71-909

Environmental Protection Agency et al., Petitioners, v. Patsy T. Mink et al. | On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[January 22, 1973]

MR. JUSTICE DOUGLAS, dissenting.

The starting point of a decision usually indicates the result. My starting point is what I believe to be the philosophy of Congress expressed in the Freedom of Information Act, 5 U. S. C. § 552.

Henry Steele Commager, our noted historian, recently wrote:

> "The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to. Now almost everything that the Pentagon and the CIA do is shrouded in secrecy. Not only are the American people not permitted to know what they are up to but even the Congress and, one suspects, the President [witness the 'unauthorized' bombing of the North last fall and winter] are kept in darkness." The New York Review of Books, Oct. 5, 1972, p. 7.

Two days after we granted certiorari in the case on March 6, 1972, the President revoked the old Executive Order 10501 and substituted a new one, Executive Order 11652, dated March 8, 1972, and effective June 1, 1972. The new Order states in its first paragraph that "The interests of the United States and its citizens are best

served by making information regarding the affairs of Government readily available to the public. This concept of an informed citizenry is reflected in the Freedom of Information Act and in the current public information policies of the executives branch."

While "classified information or material" as used in the Order is exempted from public disclosure, § 4 of the Order states that each classified document shall "to the extent practicable be so marked as to indicate which portions are classified, at what level, and which portions are not classified in order to facilitate excerpting and other use." § 4 (A). And it goes on to say "Material containing references to classified materials, which references do not reveal classified information, shall not be classified." *Ibid.*

The Freedom of Information Act does not clash with the Executive Order. Indeed the new Executive Order precisely meshes with the Act and with the construction given it by the Court of Appeals. Section 552 (a)(3) of the Act gives the District Court "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." Section 552 (a)(3) goes on to prescribe the procedure to be employed by the District Court. It says "the court shall determine the matter *de novo* and the burden is on the agency to sustain its action."

The Act and the Executive Order read together mean at the very minimum that the District Court has power to direct the agency in question to go through the suppressed document and make the portion-by-portion classification to facilitate the excerpting as required by the Executive Order. Section 552 (a)(3) means also that the District Court may in its discretion collaborate with the agency to make certain that the congressional policy of disclosure is effectuated.

The Court of Appeals, in an exceedingly responsible opinion, directed the District Court to proceed as follows:

> "(1) where material is separately *unclassified* but nonetheless under the umbrella of a 'secret' file, the District Court should make sure that it is disclosed under the Act. This seems clear from § 552 (b)(1) which states 'This section does not apply to matters that are (1) specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy.' Unless the *unclassified* appendage to a 'secret' file falls under some other exception in § 552 (b) it seems clear that it must be disclosed. The only other exception under which refuge is now sought is (b)(5) which reads that the section does not apply to 'inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.'"

This exemption was described in the House Report as covering "any internal memorandums which would routinely be disclosed to a private party through the discovery process in litigation with the agency." H. R. Rep. No. 1497, 89th Cong., 2d Sess., p. 10. It is clear from the legislative history that while opinions and staff advice are exempt, factual matters are not. H. Rep., *supra*, at 10; S. Rep. No. 813, 89th Cong., 1st Sess., p. 9. And the courts have uniformly agreed on that construction of the Act. See *Soucie* v. *David*, 448 F. 2d 1067; *Grumman Aircraft Eng. Corp.* v. *Renegotiating Bd.*, 425 F. 2d 578; *Long Island R. Co.* v. *United States*, 318 F. Supp. 490; *Consumers Union* v. *Veterans Adm.*, 301 F. Supp. 796.

Facts and opinions may, as the Court of Appeals noted, be "inextricably intertwined with policy making processes" in some cases. In such an event, secrecy prevails.

Yet where facts and opinions can be separated, the Act allows the full light of publicity to be placed on the facts.

Section 552 (c) seems to seal the case against the government when it says "This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section." Disclosure, rather than secrecy, is the rule, save for the specific exceptions in subsection (b).

The Government seeks to escape from the Act by making the Government stamp of "Top Secret" or "Secret" a barrier to the performance of the District Court's functions under § 552 (a)(3) of the Act. The majority makes the stamp sancrosanct, thereby immunizing stamped documents from judicial scrutiny, whether or not factual information contained in the document is in fact colorably related to interests of the national defense or foreign policy. Yet anyone who has ever been in the Executive Branch knows how convenient the "Top Secret" or "Secret" stamp is, how easy it is to use, and how it covers perhaps for decades the footprints of a nervous bureaucrat or a wary executive.

I repeat what I said in *Gravel* v. *United States*, 408 U. S. 606, 641–642 (dissenting opinion):

> ". . . as has been revealed by such exposes as the Pentagon Papers, the My Lai massacres, the Gulf of Tonkin 'incident,' and the Bay of Pigs invasion, the Government usually suppresses damaging news but highlights favorable news. In this filtering process the secrecy stamp is the official's tool of suppression and it has been used to withhold information which in '99½%' of the cases would present no danger to national security. To refuse to publish 'classified' reports would at times relegate a publisher to distributing only the press releases of Government or remaining silent; if it printed only the press releases or 'leaks' it would become an arm

> of officialdom, not its critic. Rather, in my view, when a publisher obtains a classified document he should be free to print it without fear of retribution, unless it contains material directly bearing on future, sensitive planning of the Government."

The Government looks aghast at a federal judge even looking at the secret files and deals with disdain the prospect of responsible judicial action in the area. It suggests that judges have no business declassifying "secrets," that judges are not familiar with the stuff with which these "Top Secret" or "Secret" documents deal.

That is to misconceive and distort the judicial function under § 552 (a)(3) of the Act. The Court of Appeals never dreamed that the trial judge would reclassify documents. His first task would be to determine whether nonsecret material was a mere appendage to a "secret" or "top secret" file. His second task would be to determine whether under normal discovery procedures contained in Rule 26 of the Rules of Civil Procedure, factual material in these "secret" or "top secret" material is detached from the "secret" and would therefore be available to litigants confronting the agency in ordinary lawsuits.

Unless the District Court can do those things, the much advertised Freedom of Information Act is on its way to becoming a shambles.[1] Unless federal courts can be

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[1] My Brother STEWART, with all deference, helps makes a shambles of the Act by reading § 552 (b)(1) as swallowing all the other eight exceptions. While § 552 (b)(1) exempts matters "specifically required by the Executive order to be kept secret in the interest of the national defense or foreign policy," § 4 of the Executive Order, as I have noted, contemplates that not all portions of a document classified as "secret" are necessarily "secret," for the order contemplates "excerpting" of some material. Refereeing what may properly be excerpted is part of the judicial task. This is made obvious by § 552 (b)(5) which keeps secret "inter-agency or intra-agency memorandums or letters which would not be available by

trusted, the Executive will hold complete sway and by *ipse dixit* make even the time of day "top secret." Certainly, the decision today will upset the "workable formula," at the heart of the legislative scheme, "which encompasses, balances, and protects all interests, yet places emphasis on the fullest possible disclosure." S. Rep. No. 813, *supra*, at 3. The Executive Branch now has *carte blanche* to insulate information from public scrutiny whether or not that information bears any discernible relation to the interests sought to be protected by subsection (b)(1) of the Act. We should remember the words of Madison:

> "A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy or perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power knowledge gives." [2]

I would affirm the judgment below.

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law to a party other than an agency in litigation with the agency." The bureaucrat who uses the "secret" stamp obviously does not have the final say as to what "memorandums or letters" would be available by law under the Fifth exception, for § 552 (a)(3) gives the District Court authority, where agency records are alleged to be "improperly withheld" to "determine the matter *de novo*," the "burden" being on the agency "to sustain its action." Hence § 552 (b)(5), behind which the executive agency seeks refuge here, establishes a policy which is served by the fact-opinion distinction long established in federal discovery. The question is whether a private party would routinely be entitled to disclosure through discovery of some or all of the material sought to be excerpted. When the Court answers that no such inquiry can be made under § 552 (b)(1), it makes a shambles of the disclosure mechanism which Congress tried to create. To make obvious the interplay of the nine exceptions listed in § 552 (b), as well as § 552 (c), I have attached them as an Appendix to this dissent.

[2] Letter to W. T. Barry, Aug. 4, 1822, IX The Writings of James Madison (Hunt ed. 1910) 103.

APPENDIX

Sec. 552 (b) and (c) of the Freedom of Information Act reads as follows:

(b) This section does not apply to matters that are—

(1) specifically required by Executive order to be kept secret in the interest of national defense or foreign policy;

(2) related solely to the internal personnel rules and practices of an agency;

(3) specifically exempted from disclosure by statute;

(4) trade secrets and commerical or financial information obtained from a person and privileged or confidential;

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency;

(8) contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions; or

(9) geological and geophysical information and data, including maps, concerning wells.

(c) This section does not authorize withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from Congress.